TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 89

J. ROBERT OGDEN, PETITIONER,

vs.

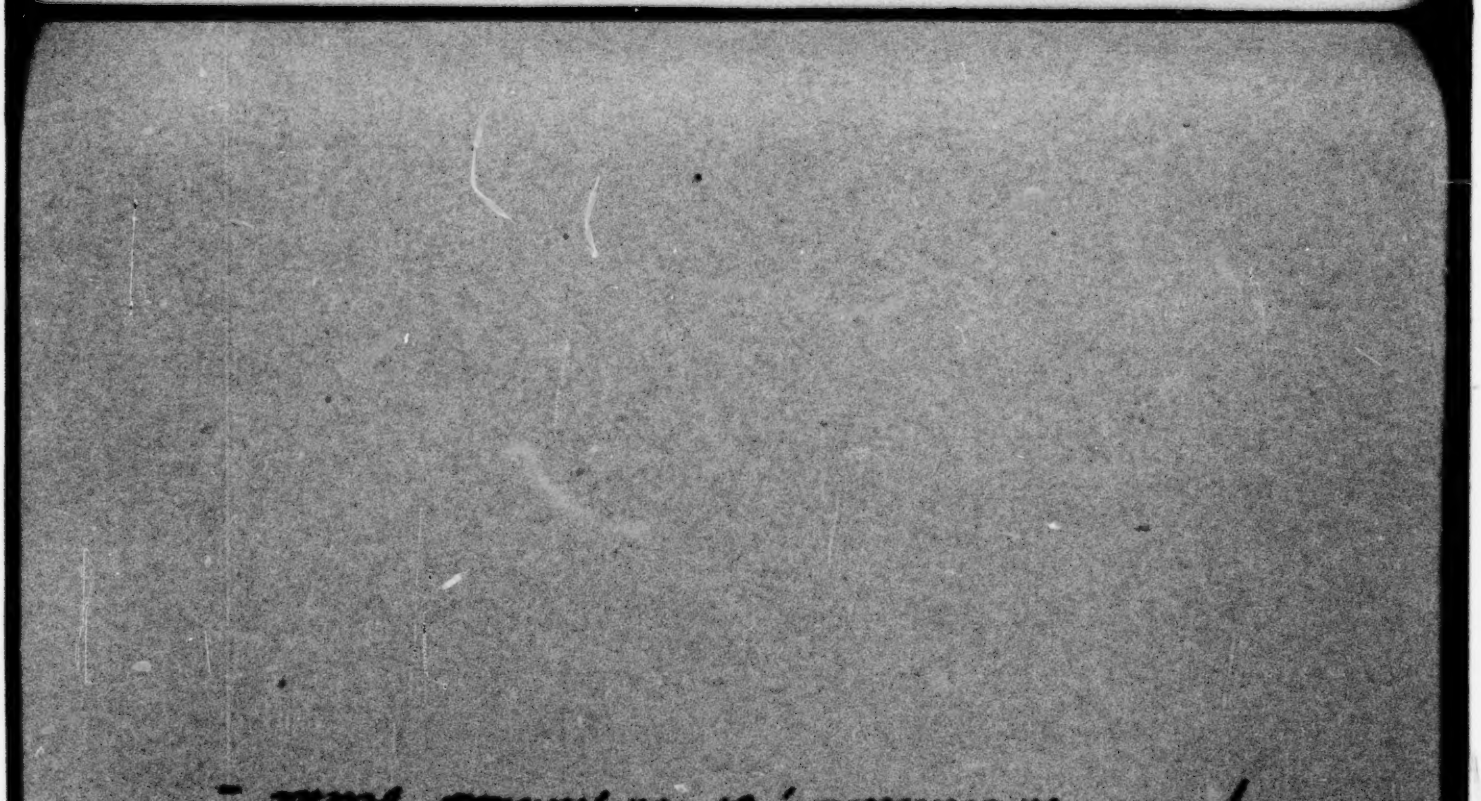
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1936

CERTIORARI GRANTED APRIL 13, 1936

(33,285)



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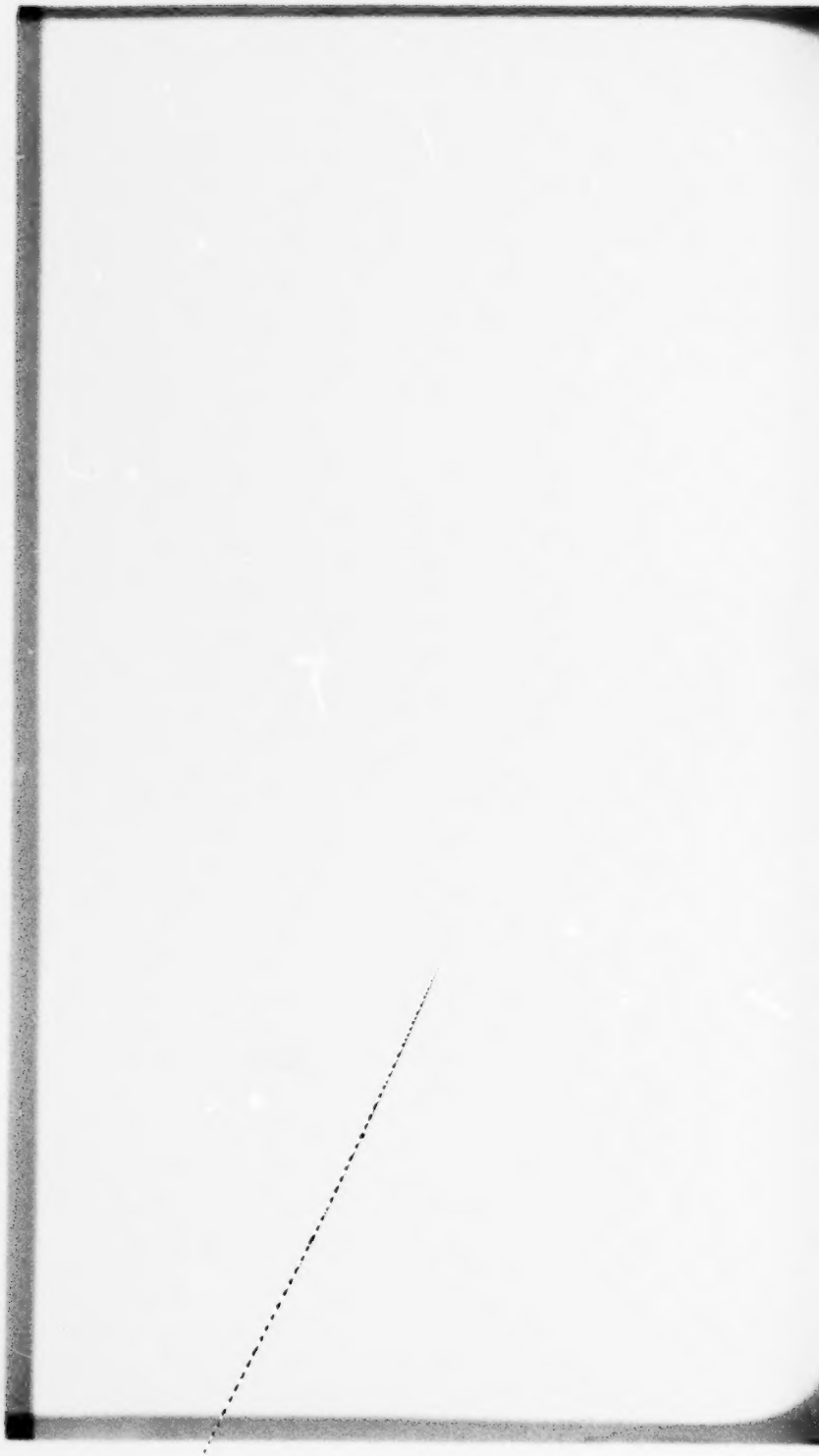

[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

J. Robert Cogen et al., Plaintiff-in-Error,

against

United States of America, Defendant-in-Error

In the matter of the application for the return of certain papers, cards, memoranda and books, and other papers and memoranda seized from the person of the defendant, J. Robert Cogen and for the suppression of all evidence obtained therefrom

Writ of Error

The President of the United States to the Honorable Judges of the United States District Court for the Southern District of New York:

Because in the record and proceedings as also in the entry of an order dated January 12th, 1928, upon application by and between J. Robert Cogen, plaintiff-in-error, [fol. 2] manifest error is alleged to the great damage of the plaintiff-in-error, and willing that error if any there be should be duly corrected and full and speedy justice done, do command you that you send the record and proceedings herein with all things concerning the same to the Circuit Court of Appeals of the United States, for the Second Circuit, together with this writ, so that you have the same in said Circuit Court of Appeals at the Old Post Office Building, in the Borough of Manhattan, City of New York, within thirty days from date hereof and that the record and proceedings aforesaid being inspected that the said Circuit Court of Appeals may cause further to be done therein to correct the errors assigned.

Witness Honorable William H. Taft, Chief Justice of the United States, the 17th day of January, 1928.

Alex. Gilchrist, Jr., Clerk United States District Court.

The foregoing writ is hereby allowed.

Manton, U. S. C. J.

[fol. 3] In United States District Court

[Title omitted]

Notice of Motion for Order Directing Return of Certain Papers, Etc.

Sir: Please Take Notice that upon the annexed affidavit of J. Robert Cogen, duly verified on the 2nd day of November, 1927, the undersigned will move this Court on the 7th day of November, 1927, at the United States District Court for the Southern District of New York, Room 331 Old Post Office Building, Park Row, in the Borough of Man-
[fol. 4] hattan, City of New York, at 10:30 o'clock in the forenoon of that day or as soon thereafter as Counsel can be heard, for an order directing the United States Attorney for the Southern District of New York, and his assistants or whomsoever may have custody and possession thereof, to return all those certain papers, cards, memoranda and books, and other papers and memoranda, and all copies thereof, seized from the person of J. Robert Cogen, and for the suppression of all evidence obtained therefrom and for such other and further relief as to the Court may seem proper.

Dated New York, November 3rd, 1927.

Yours, etc., Sanford H. Cohen, Attorney for Defendant, J. Robert Cogen. Office & P. O. Address: 217 Broadway, Borough of Manhattan, City of New York.

To Charles H. Tuttle, Esq., United States Attorney.

[fol. 5] In United States District Court

[Title omitted]

Affidavit of J. Robert Cogen in Support of Motion

State of New York,
City of New York,
County of New York, ss:

J. Robert Cogen, being duly sworn, deposes and says: I am the defendant named in the above entitled action.

That on the 4th day of May, 1927, I was in the store owned and operated by one, Jacob Glasgal, having pro-
[fol. 6] ceeded to said store at the invitation and request of said Jacob Glasgal.

That while I was in said store a man whom I later learned was William H. Moore, a Prohibition Agent, came to me and asked me whether I was Cogen. I stated that I was and then, another man, whom I later learned was Prohibition Agent James J. Donovan, came up to me and proceeded to search my person and took from me various papers, memoranda, books, cards and other papers and then told me that I was under arrest. He then took me to the Old Post Office Building and while I waited in the office of an Assistant United States Attorney they drew up a complaint against me and after the said complaint was signed I was arraigned before United States Commissioner O'Neill and held under bail in the sum of Ten thousand ($10,000.00) Dollars.

At the time of the said search and seizure of the said papers, etc., which as stated herein were taken from my possession and person, there was no warrant of arrest outstanding against me nor had I committed any crime in the presence of this officer or of any other officer.

I am informed that a search of the records of the United States Commissioner shows that the only complaint signed or filed against me was the complaint which was made after my arrest and which is the one under which I was held under bail and that the said complaint was made after I was brought to the United States Attorney's Office and after the search and seizure herein mentioned.

[fol. 7] I am informed and believe that in a proceeding for the revocation of a permit of the Getsol Chemical Co., which hearing was held at the Prohibition Department, that Agent James J. Donovan was a witness at said hearing and in the course of his examination admitted that he had no warrant for my arrest and that before the said James J. Donovan saw me in the store of Glasgal he had made no effort to apprehend me.

That in the course of his testimony, Agent Donovan testified as follows, referring to my arrest as above mentioned:

"Q. When you walked in back of the store, you said, 'You are under arrest'?
A. That's right.
Q. He didn't commit any violation of the law?
A. No.
Q. And you had no warrant?
A. No."

It, therefore, appears that the said search and seizure of the papers from my person was unlawful and illegal and that the said Prohibition Agent Donovan was without legal authority to make the search and seizure under any circumstances.

I am further informed and believe that some or all of these papers, or copies thereof, have been turned over by the said Prohibition Agent, James J. Donovan, to the United States Attorney, or his Assistants, and that these papers, memoranda, books, documents, etc. are intended [fol. 8] to be used by the United States Attorney, or his Assistants, upon the trial of the Indictment now pending against me and of using the information obtained therefrom at the said trial.

I beg leave to refer to the complaint on file in the office of United States Commissioner O'Neill in support of the statements herein made.

That this affidavit is made for the purpose of the issuance of an order for the return of all the books, papers, memoranda, etc., seized, as aforesaid, together with all copies thereof, and for a further order to the United States Attorney directing him, or his assistants, not to offer the same in evidence or to offer any testimony on any transaction mentioned in any of the seized papers upon the trial, and that the said order be directed to any person who may have possession thereof, and that return thereof has already been demanded and refused.

That the said illegal search and seizure are in prejudice of my Constitutional rights and the said search and seizure was in violation thereof.

That no previous application has been made for this order.

J. Robert Cogen.

Sworn to before me this 2nd day of November, 1927. George Cohen, Notary Public, New York County. Term expires March 30, 1929. New York Co. Clerk's No. 131. Reg. No. 9145.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JAMES J. DONOVAN IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

I, James J. Donovan, being duly sworn, deposes and says:

[fol. 10] I am a Prohibition Agent, appointed by and acting under the authority of the Secretary of the Treasury of the United States of America.

I am the Prohibition Agent who, on May 4, 1927 arrested J. Robert Cogen and swore to the complaint filed against the aforesaid J. Robert Cogen.

I am also the Prohibition Agent who testified at the revocation hearing of the P. T. Chemical Company at the Prohibition Office on July 7, 1927.

On April 25, 1927, I obtained a statement from Druggist Jacob Glasgal, 1435 Madison Avenue, New York City, that approximately over one hundred (100) whiskey prescription blanks which I had in my possession were purchased by him from J. Robert Cogen, a whiskey salesman employed by the Baltimore Distilling Company.

Mr. Glasgal stated to me that he had purchased whiskey blanks from J. Robert Cogen since about August, 1926, and that he sold practically all of his whiskey withdrawals to the aforesaid Cogen for the price of $66.00 per case.

On April 26, 1927, Jacob Glasgal handed to me twenty-four (24) uncancelled prescription blanks which he said were given to his brother, Nathan Glasgal, a clerk in the drug store, on April 25th by the aforesaid J. Robert Cogen, who had called at the Glasgal Pharmacy on April 25, 1927, while Jacob Glasgal was at the United States Attorney's Office.

Glasgal had stated that Cogen had informed Glasgal's brother that he would return on the following day (April [fol. 11] 26th) and get the whiskey. Accordingly, on April 26th, Glasgal's store was placed under observation, Agent Moore and myself waiting for Cogen to call for the whiskey. Cogen did not call at the store on this date, but on April 26th, while I was at the Glasgal store a man, who said he was Cogen, telephoned Glasgal. I was permitted by Mr. Glasgal to stand close to the receiver and overhear the conversation. This man, who alleged to be Cogen, stated to Glasgal that he had brought twenty-four (24) prescriptions to the store and given them to Glasgal's brother, but that he would not be in for the whiskey until a few days later as he wanted to see if the prohibition office was going to take any action against Glasgal. (Glasgal's brother, according to Glasgal's statement, had informed Cogen on April 25th that prohibition agents had conducted Jacob Glasgal to the United States Attorney's office after having accused him of buying stolen whiskey prescription blanks.)

On May 3, 1927, I overheard a telephone conversation to Mr. Glasgal from a man who claimed to be Cogen, that he would call for the case of whiskey on the following day, May 4th, and if Mr. Glasgal desired, bring prescription blanks covering another case of whiskey and would take that also away. Mr. Glasgal, in my presence, stated to this person, "No, don't bring any more prescriptions, one case is enough."

On May 4, 1927, accompanied by Prohibition Agent William H. Moore, I took a position in a restaurant on the northwest corner of 98th Street, opposite the Glasgal Phar- [fol. 12] macy, where I could obtain a clear view of the store. At about three o'clock, a car drove up 98th Street and stopped at the corner of Madison Avenue. Two men went from the car into the Glasgal drugstore. About one-half hour later the taller of the two men emerged from the side door of the pharmacy on 98th Street, carrying two packages wrapped in tar paper, about the size of twelve pints of whiskey each. Entering the automobile, he drove away at a great rate of speed, although I followed him in a taxicab, I was unable to intercept him.

On returning to the store I found Prohibition Agent William H. Moore standing in the front part of the drugstore

in conversation with Druggist Glasgal. Agent Moore informed me that Cogen was in the back room. I entered the back room accompanied by Agent Moore and Druggist Glasgal and asked the man if his name was Cogen. He said that it was. I thereupon proceeded to search him, after telling him that he was under arrest. I took from various inside pockets a memorandum book, cards and papers; and from his right hand overcoat pocket I took a rolled elastic tied package which, when opened, proved to be eighty-one (81) uncancelled whiskey prescription blanks.

At that time we were in possession of sufficient evidence to obtain a warrant for his arrest, namely, the affidavit of Jacob Glasgal and the affidavit of his brother Nathan Glasgal, who was alleged to have received from Cogen the [fol. 13] twenty-four (24) uncancelled prescriptions on April 25th.

I also overheard a telephone conversation to Glasgal from a person who claimed to be Cogen, discussing the stolen prescription blanks found in the Glasgal store, and also Cogen's plan of calling for the whiskey on May 4th.

James J. Donovan.

Sworn to before me this 5 day of December, 1927.
Francis A. O'Neill, U. S. Commissioner, So. Dist. of N. Y.

[fol. 14] In United States District Court

[Title omitted]

Affidavit of John J. Fogarty in Opposition to Motion

State of New York,
County of New York,
Southern District of New York, ss:

I, John J. Fogarty, being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Southern District of New York, appointed by and acting under [fol. 15] the authority of the Attorney General of the United States of America.

I am the Assistant United States Attorney that presented the case of J. Robert Cogen, et al. to the United States

Grand Jury for the Southern District of New York which Grand Jury indicted Cogen and numerous others for conspiracy to violate the National Prohibition Act in that they did buy and sell in prescriptions illegally obtained.

Jacob Glasgal, a druggist, located at 1435 Madison Avenue, New York City, referred to in the annexed affidavit of Prohibition Agent James J. Donovan, came to my office and stated to me that he had purchased whiskey prescription blanks from one J. Robert Cogen since about August, 1926 and that he sold practically all of his whiskey withdrawals to the aforesaid Cogen for the price of $66.00 per case.

Glasgal also informed me that Cogen had told his Glasgal's brother that he would return on April 26 to get some whiskey which he had previously negotiated for with Glasgal.

Both Jacob Glasgal and his brother Nathan Glasgal made affidavits outlining in detail their dealings with Cogen, copies of these affidavits are on file in the United States Attorney's office.

John J. Fogarty.

Sworn to before me this — day of December, 1927.

———.

[fol. 16] In United States District Court

[Title omitted]

Reply Affidavit of J. Robert Cogen in Support of Motion

State of New York,
City of New York,
County of New York, ss:

J. Robert Cogen being duly sworn, deposes and says:—I have read the affidavit of James J. Donovan and I deny that I phoned to Jacob Glasgal on the days claimed in said affidavit.

[fol. 17] That said Agent Donovan claims in his affidavit that he saw a man, not myself, come from the side door of Glasgal's drugstore carrying two packages wrapped in tar paper about the size of Twelve (12) pints of whiskey

each. I desire to call attention to the fact that he does not claim that the packages actually contained Twelve (12) pints of whiskey or that it looked as if it contained whiskey but only contends that it looked the size of Twelve (12) pints of whiskey, which does not in any way indicate that there was any appearance about the package to give him the warrant to believe there were Twelve (12) pints of whiskey in such package.

As a matter of fact, Agent Donovan, in sworn testimony given on June 30th, 1927, at the Prohibition Department, testified as follows:

"Q. You saw one come out with a package?
A. Yes.
Q. How were they wrapped?
A. In tar paper.
Q. And tied up?
A. Yes.
Q. From where you were standing, you didn't know what was in it?
A. I didn't."

I desire further to point out that at the time of the search upon me that neither the Assistant United States Attorney nor Mr. Donovan believed that there was sufficient evidence upon which a complaint could be filed against me for the purposes of obtaining a warrant.

That this is the fact is also shown by the sworn testimony given by Agent Donovan:

[fol. 18] "Q. Did you inform any Assistant U. S. Attorney of that affidavit?
A. I did.
Q. Did you at any time swear out a complaint against Glasgal in connection with this submission?
A. No.
Q. But you told him he would not be prosecuted?
A. Assistant U. S. Attorney Fogarty told him.
Q. Before or after?
A. Before he signed the affidavit.
Q. That was in your presence?
A. That's right.
Q. And then Glasgal put this all in writing?
A. Yes.

Q. Did you ever file a complaint against Glasgal?
A. No.
Q. Has he ever been indicted?
A. No.
Q. On the 25th, did you swear to complaint against Cogen?
A. No.
Q. Did you at any time up to the 4th of May make any complaint?
A. No.
Q. Did you have any warrant for the arrest of Cogen?
A. No.
Q. Did Glasgal tell you where Cogen lived?
A. No.
Q. Do you know where Cogen lived?
A. No.
Q. Did you try to ascertain where he lived?
A. No.
Q. Did you make any effort to apprehend Cogen on this statement he has made?
A. No.
Q. No effort at all?
A. No."

[fol. 19] I reiterate what was stated by me in my original affidavit attached to the moving papers, that I was searched first and arrested after and again refer to the fact that in sworn testimony Agent Donovan admitted that I committed no violation of the law and that he had no warrant of arrest.

J. Robert Cogen.

Sworn to before me this 19th day of December, 1927. George Cohen, Notary Public, New York County. Term expires March 30, 1929. New York Co. Clerk's No. 181. Reg. No. 9145.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Hon. Charles H. Tuttle, U. S. Attorney, by Robert B. Watts, Esq., Assistant U. S. Attorney, for the United States;

Sanford H. Cohen, Esq., for Cogen.

MEMORANDUM OPINION

This motion to direct the District Attorney to return the documentary evidence seized at the time of defendant's ar- [fol. 20] rest is denied. The contention that the search and seizure was not an incident to the arrest, but rather led to the arrest I find untenable. Certainly the agents would have been remiss if they had not decided to arrest this defendant after the other man had made his escape, in view of the strong evidence that they already had against this defendant. I am convinced that the search was incident to the arrest.

The only question remaining is whether the arrest was lawful. That presents two points—1 whether the agents had probable cause for believing the defendant guilty of a felony, and 2 whether they as Prohibition Agents had the right to arrest without a warrant even though there was probable cause.

As to the first point, I do not see how counsel for the defendant can seriously urge that the agents did not have probable cause for believing defendant guilty of a felony. They had strong evidence of his guilt, even though some of it was hearsay.

As to the contention that the agents had no authority, however strong the evidence of the defendant's guilt, merely because the section defining the felony of conspiracy is found in the Criminal Code instead of the National Prohibition Act, I think that is more ingenious than sound. The motion is therefore denied.

Dated Dec. 30, 1927.

Frank J. Coleman, U. S. D. J.

[fol. 21] In United States District Court

[Title omitted]

Order Appealed From—Jan. 12, 1928

A motion having come on regularly to be heard to return certain papers, cards, memoranda and books, and other [fol. 22] papers and memoranda, and all copies thereof, seized from the person of J. Robert Cogen, and for the suppression of any evidence obtained therefrom,

Now upon the Notice of Motion dated November 3rd, 1927 and the affidavit of J. Robert Cogen duly verified on the 2nd day of November, 1927, and the Reply Affidavit of J. Robert Cogen duly verified on the 19th day of December, 1927, in support of said motion, and the affidavits of James J. Donovan and John J. Fogarty duly verified the — day of December, 1927, in opposition to said motion, and after hearing Sanford H. Cohen, attorney for J. Robert Cogen, in support of said motion, and Charles H. Tuttle, United States Attorney (Robert Watts, Esq., Assistant United States Attorney), in opposition thereto, and due deliberation having been had, and upon filing the Opinion of the Court, it is

Ordered that the said motion be and hereby is denied.

Frank J. Coleman, U. S. District Judge.

Approved as to form. R. B. Watts, Asst. U. S. Atty.

[fol. 23] In United States District Court

[Title omitted]

Petition for Writ of Error

And now comes the plaintiff-in-error, J. Robert Cogen, by his attorney, Sanford H. Cohen, and complains that in the record and proceedings in the above entitled cause and also by the order made in this proceeding and filed January 12th, 1928, in the United States District Court for the Southern District of New York against the aforesaid plaintiff-in-error, manifest error hath happened to the great damage of said plaintiff-in-error,

Wherefore the said plaintiff in error prays for the allowance of a Writ of Error and for such other orders and [fol. 24] processes as may cause all and singular the record and proceedings in said case to be sent to the United States Judges for the Circuit Court of Appeals in and for the Second Circuit under and according to the laws of the United States in that behalf made and provided, so that the same may be inspected, the said Judges of the said Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error, what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action be suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals for the Second Circuit, and your petitioner will ever pray.

Dated New York, January 17th, 1928.

Sanford H. Cohen, Attorney for Plaintiff in Error.
Office & P. O. address, 217 Broadway, Borough of Manhattan, City of New York.

In United States District Court

Order Allowing Writ of Error

The within Writ of Error is allowed and the trial of the plaintiff in error is stayed and the use of the records, etc., which is subject of the appeal is stayed until the determination of the appeal.

January 17th, 1928.

Manton, U. S. C. J.

[fol. 25] In United States District Court

[Title omitted]

Assignments of Error

And now comes J. Robert Cogen, plaintiff in error, and in connection with his petition for a Writ of Error, makes the following Assignments of Error, to wit:

That the Court erred in making the order dated January 12th, 1928, whereby it denied the motion to direct the United States Attorney for the Southern District of New York, and his Assisants or whomsoever may have custody and possession thereof, to return all those certain papers, cards, memoranda and books and all other papers and memo- [fol. 26] randa and all copies thereof seized from the person of your plaintiff in error and for the suppression of all evidence obtained therefrom, all upon the following grounds:

1. That there was no probable cause for believing that a felony had been committed.

2. That no felony had in fact been committed and there was no reasonable cause for believing the defendant to have committed it.

3. That the agents arrested the defendant for a misdemeanor not committed in their presence.

4. That the agents were not peace officers and could not arrest except where a felony had actually been committed and were governed by the same rules of law under which a private person may arrest another.

5. That the arrest was without a warrant and was illegal and the search and seizure was illegal.

6. That the arrest was made subsequent to the search and seizure.

7. That the alleged affidavits in the possession of the agents did not furnish proof that a felony had been committed.

8. That the affidavits in the possession of the agents were not in proper form upon which a warrant could issue.

[fols. 27 and 28] 9. That the affidavits, etc., did not furnish the agents with probable cause to believe a felony had been committed.

10. That the search and seizure herein violated the rights of the plaintiff in error herein under the Fourth Amendment of the Constitution of the United States for it was without probable cause.

Wherefore the plaintiff-in-error prays that the order of the District Court be reversed.

Sanford H. Cohen, Attorney for Plaintiff-in-Error, Office & P. O. Address, 217 Broadway, Borough of Manhattan, City of New York.

Citation, in usual form, omitted in printing.

[fol. 29] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated January 28th, 1928.

Sanford H. Cohen, Attorney for Plaintiff-in-Error.
Charles H. Tuttle, U. S. Attorney, Attorney for Defendant-in-Error.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 31] In United States Circuit Court of Appeals for the Second Circuit

J. Robert Cohen, Plaintiff-in-Error,

against

United States of America, Defendant-in-Error.

Before Manton, L. Hand, and Augustus N. Hand, Circuit Judges.

Opinion

Writ of error to the District Court for the Southern District of New York to review an order denying a motion to return certain papers found upon the person of the defendant at the time of his arrest.

The plaintiff-in-error was arrested without warrant in a drug store by a prohibition agent, the nature of the charge,

if declared at all at the time, not appearing in the record. A complaint was then sworn out against him, the contents of which also does not appear, and later he was indicted for a conspiracy to violate the National Prohibition Law. At the time of his arrest, but whether before or after it was made is in dispute, the agent searched his person, and in his pockets found a memorandum book, certain cards and papers and a package of eighty-one uncancelled whisky [fol. 32] prescription blanks. These the agent seized and delivered to the district attorney for use upon trial of the indictment.

The plaintiff-in-error then moved upon affidavit in the District Court to compel the district attorney to return the papers and to suppress their use as evidence. The grounds for this motion were that he was unlawfully arrested, and that in any event he was searched before his arrest. The district judge decided both points against him and denied the motion.

Sanford H. Cohen, for the Plaintiff-in-Error.
Robert B. Watts, for the Defendant-in-Error.

L. Hand, circuit judge:

Papers, like other chattels, can ordinarily be recovered only by some possessory remedy such as replevin; we have to do neither with that, nor with a bill in equity for the same relief. This case comes up upon motion in the criminal prosecution then pending, and while we attach no significance to the way in which the papers are entitled, it is plain that unless the motion lay as an independent proceeding, it was but a step in the defense and the order is not a "final decision" under Section 128 of the Judicial Code. Under Section 16 of the Search Warrant Act upon the return of the executing officer the judge or commissioner allowing the writ is to restore property unlawfully seized. Such an order after indictment was treated sub silentio as a "final decision," in Steele v. U. S., No. 1267 U. S. 498, and in In Re No. 21 Front Street, 5 Fed. (2) 282, (C. C. A. 2), and U. S. v. Kirschenblatt, 16 Fed. (2) [fol. 33] 202, (C. C. A. 2), we did the same. As search warrants are almost invariably issued before indictment, it is probable that in all these cases the warrants had issued before the indictments were found, but that circumstance

was not considered. In Re Hollywood, 5 Fed. (2) 651, (C. C. A. 2), seems not to have involved any prosecution. On the other hand, in Coastwise, etc., Co. v. U. S., 259 Fed. Rep. 847 (C. C. A. 2), we held that an order upon search warrant issued before indictment was not appealable if entered after indictment found, and the same was ruled by the Ninth Circuit in Jacobs v. U. S., 8 Fed. (2) 981, distinguishing Steele v. U. S., because in that case no suppression of the evidence had been asked. See also U. S. v. Mattingly, 285 Fed. Rep. 922, (C. A., D. C.). We need not now consider how far the last three cases can stand after Steele v. U. S., or whether it makes any difference that a prayer is added for the suppression of the evidence. It is enough that the order at bar did not determine a search warrant proceeding.

In Essgee Company v. U. S., 262 U. S. 151, an order was reviewed which after indictment denied the return of papers produced in compliance with a subpœna duces tecum issued by the grand jury. The point was again assumed without discussion, and the case is in any event to be distinguished in that the motion was a determination of a proceeding commenced by the court's writ. In this regard it was like a search warrant, though issuing as of course. No doubt a court has always supervision over the [fol. 34] execution of its writs, Wise v. Henkel, 220 U. S. 556, 558, and its orders may perhaps be treated as final which dispose of them.

Again the motion was not made and decided before indictment found to compel the district attorney to return papers unlawfully seized, like Perlman v. U. S., 247 U. S. 7 and Burdeau v. McDowell, 256 U. S. 465; or after the indictment had been quashed, In Re Brenner, 6 Fed. (2) 425, (C. C. A. 2). Dowling v. Collins, 10 Fed. (2) 62, (C. C. A. 6), arose upon orders made after search warrant and moreover the chattels seized had a value quite independent of their use as evidence. Possibly in such a case an order even though not disposing of a writ should be treated as final, because it determines the title to the property. In the case at bar no writ had issued and the property, so far as appears by the record, was of no value except as evidence on the trial. A motion to suppress and surrender the evidence, made after indictment in such a case, appears

to us no more than a step in preparation for the trial and the order as interlocutory.

Appeal dismissed.

[fol. 35] In United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Concurring Opinion

Manton, circuit judge (concurring):

The order appealed from denied the application of the plaintiff in error for the return of papers, cards, memoranda and books seized from his person. It directs their suppression as evidence which might be offered upon the trial of an indictment found against him by the Grand Jury. The order is not appealable because it is interlocutory and not final. It was not an independent proceeding. The application for their return, as unlawful, in violation of the constitutional rights of this plaintiff in error, was prosecuted as an incident to the pending criminal proceedings. If it were an independent proceeding, the order is final and appealable under 225 of Title 28 of the United States Annotated Code.

The mere fact that criminal proceedings were pending prior to the petition for the return of the papers is not of itself conclusive on the question of whether the petition enters the criminal prosecution, nor would the fact that the [fol. 36] property was seized pursuant to a search warrant make the proceeding for the return of such property a special proceeding. Where the petition is directed to the warrant itself, and seeks the return of property seized thereunder, it is a special proceeding and the pendency of the criminal action is unimportant. Steele v. United States, 267 U. S. 505; United States v. Kirschenblatt, 16 Fed. (2nd) 202. Similarly where property is obtained under subpœna duces tecum. Essgee Co., etc., v. United States, 262 U. S. 151. But where the application attacks the warrant demanding a return of the property and seeks to suppress the property seized as evidence then, if there be a criminal action pending, the application must be regarded

as within the criminal proceeding and the order entered is interlocutory. Jacobs, et al. v. United States, 8 Fed. (2nd) 981; Coastwise Lumber & Supply Co. v. United States, 259 Fed. 847. In Kirwin v. United States, 5 Fed. (2nd) 282, we reviewed an application made during the pendency of a criminal action which sought to vacate a search warrant and incidentally asked for the suppression of any information obtained therefrom. There the application was begun under a separate and independent title and was intended primarily to attack the validity of a search warrant. Of course, if there be no criminal action pending, it would follow that an application respecting an alleged illegal search warrant is a special proceeding. Burdeau v. McDowell, 256 U. S. 465; In re Hollywood Cabaret, etc., 5 Fed. (2nd) 651. So where the application is made by a third [fol. 37] party asserting that his property has been wrongfully seized, an order entered is final and appealable and it is immaterial whether criminal proceedings are pending or whether search was made pursuant to an alleged illegal arrest or alleged illegal search warrant. Pearlman v. United States, 247 U. S. 7.

At bar, the papers were seized pursuant to a claimed illegal arrest. The application not only asked for the return of the papers, but for their suppression as evidence, and it is clear that the application was in the criminal action and the order entered is interlocutory and not appealable.

The appeal should be dismissed.

[fol. 38] In United States Circuit Court of Appeals, Second Circuit

J. Robert Cohen, Plaintiff-in-Error,

v.

United States, Defendant-in-Error.

Error to the District Court of the United States for the Southern District of New York

Decree—Filed Feb. 29, 1928

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

[fol. 39] On consideration whereof, it is now hereby ordered, adjudged, and decreed that the appeal from said District Court be and it hereby is dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., L. H.

[File endorsement omitted.]

[fol. 40] Certificate of Wm. Parker, clerk of U. S. C. C. A., Second Circuit, to foregoing transcript omitted in printing.

[fol. 41] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 23, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,285. U. S. Circuit Court of Appeals, Second Circuit. Term No. 89, J. Robert Cogen, petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed March 9th, 1928. File No. 33,285.

OCT 29 1928

In the Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 89.

J. ROBERT COGEN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

SANFORD H. COHEN,
Attorney for Petitioner.

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In the Supreme Court of the United States.

OCTOBER TERM, 1928.

J. ROBERT OGDEN, Petitioner, vs. THE UNITED STATES OF AMERICA.	No. 89

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of the Case.

On May 4th, 1927, at 1435 Madison Avenue, New York City, prohibition agents without a warrant of any kind searched the person of the petitioner and found various papers. These they seized (R. 8, 9). Some or all of these papers were delivered to the United States Attorney.

Sometime later, it does not appear when, petitioner and others were indicted in the District Court of the United States for the Southern District of New York on a charge of conspiracy. While this indictment was pending petitioner applied in that Court for the return of the papers seized and for the suppression of evidence that the United States Attorney might have obtained therefrom, alleging that the search and seizure had been in violation of his Constitutional Rights (R. 12, 13).

This application was heard by the Hon. Frank J. Coleman, and by him denied in an order of Court dated January 12th, 1928 (R., 12).

From this order petitioner took a writ of error to the United States Circuit Court of Appeals for the Second Circuit. (Judicial Code, Section 128).

The Court of Appeals on February 20th, 1928, dismissed the "appeal" (Act of January 31st, 1928) on the sole ground that the order of the District Court was interlocutory and not appealable. The merits were not discussed. The opinion of the Court was by Judge Learned Hand (R., 15, 16, 17). Judge Manton wrote a concurring opinion (R., 18, 19).

Thereafter the petitioner applied to this Court for writ of certiorari by petition filed March 9th, 1928, which was granted on April 23rd, 1928, file No. 33,285 (R., 20), and so the case comes on to be heard here.

Single Question Presented.

Is an order of a District Court granting or refusing an application for the return of seized property, not involving the vacating of a Search warrant and made during the pendency of a criminal charge against the applicant, final and appealable?

Facts.

The person of the petitioner herein was searched by prohibition agents on May 4th, 1927, without a warrant. The agents found and seized various papers and delivered them to the United States Attorney for his use in prosecuting petitioner.

Thereafter petitioner and others were indicted in the United States District Court for the Southern District of New York on a charge of conspiracy.

While this indictment was pending petitioner (only) applied to the District Court for the return of the papers and for the suppression of evidence obtained therefrom on the ground that the search and seizure had violated his Constitutional Rights.

The above facts are not in dispute. The only disputed questions of fact were whether the arrest was before or after the search and whether any violation of law had been committed in the presence of the agents.

The petitioner insisted the search preceded the arrest (R., 31); the agent that he searched after the arrest (R., 7).

The petitioner quoted testimony of the agent that he did not commit any violation of law in the presence of the agent (R., 4).

An order denying this application was entered in the District Court on January 12th, 1928 (R., 12).

*Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit upon the ground that the District Court erred in making said order upon the grounds set forth in the assignment of errors (R., 14). The merits were not discussed but the appeal was dismissed by the Circuit Court of Appeals. That Court in its opinion stating that the District Court order was interlocutory and not appealable (R., 15, 16, 17, 18, 19).

*Petitioner actually proceeded by writ of error. Apparently in view of the Act of January 31, 1928 the C. C. A. dismissed the "appeal". To avoid confusion of names the word "appeal" will be used exclusively herein to describe the review proceeding.

Argument.

I.

The issue as to how witnesses have obtained possession of papers or other articles of personal property is collateral to a criminal case.

A defendant in a criminal case who claims that papers or other articles of personal property have been seized in violation of his rights under the Constitution cannot wait until the trial of the cause and then seek its suppression. He must move before the trial to have the property returned to him "as not subject to seizure" and the evidence suppressed, "except where there has been no opportunity to present the matter in advance of trial".

> *Segurola* vs. *United States*, 275 U. S. 106, 10 S. Ct. 77;
> *Gouled* vs. *United States*, 255 U. S. 298, 305;
> *Amos* vs. *United States*, 255 U. S. 313, 316;
> *Agnello* vs. *United States*, 269 U. S. 20, 34.

The reason assigned for this method of procedure is that such matter is collateral to the issues of the indictment. The issue "as to the source of competent evidence" is in no sense a part of the indictment and is a wholly independent matter.

> *Segurola* vs. *United States*, *supra*.

There has, therefore, become imbedded in the criminal procedure of the United States Court a motion for the return of seized papers or articles; the purpose of such motion being to make it unnecessary to delay a trial to consider such collateral matter.

Segurola vs. *United States, supra*, where the Court said:

> "* * * The court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which happened to cross the path of such litigation and which is wholly independent of it. In other words in order to raise the question of illegal seizure, and an absence of probable cause in that seizure, the defendants should have moved to have the liquor returned to them as their property and as not subject to seizure or use as evidence."

II.

The order of the District Court was final and appealable.

The term "final order" is not necessarily limited to such "decisions or decrees which finally determine all the issues presented by the pleadings". They also "apply to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles that controversy".

> *Brush Elec. Co. vs. San José Electric Imp. Co.*, 51 Fed. 557, 2 C. C. A. 373.

In that case as indicated by the headnote, it was held: "that, as the motion presented questions of law and fact not presented in the bill of complaint, an order overruling it was a 'final decision', within the meaning of the act * * *".

At bar the motion was of a collateral matter involving questions of law and fact not presented in the indictment, affected only one of the defendants (Cogen) and finally settles the controversy as to whether the seizure of the papers was in violation of the petitioner's Constitutional Rights.

The petitioner's contention is that such a motion is a special proceeding and if indictment is pending it is a special proceeding in the criminal case, and the order on the application finally determines the rights of the parties in the subject matter.

The Court below lays stress upon the fact of the pendency of the criminal proceeding as indicative that the motion was but a step in the criminal case (R., 16). In the opinion (R., 16) the Court states it attaches "no significance to the way in which the papers are entitled", but it would seem that some attention was paid to the title.*

The title has no bearing on whether a proceeding is independent or a step in another proceeding. One of the cases relied on by the concurring opinion (R., 18, 19) in the Court below confirms that view. *Goodrich Lumber & Supply Co.* vs. *United States*, 259 Fed. 847. There the Court said:

> "A defendant cannot make an interlocutory order final by the choice of any particular form of title."

The question then is, Was the order actually interlocutory or final?

Prior to the decision of this Court in *Steele* vs. *U. S. No. 2*, 267 U. S. 505, 507, the Circuit Court of Appeals for the Second Circuit had determined that an order

*The papers at bar are actually entitled as a separate special proceeding and the title of the Criminal Proceeding is added to indicate in which matter the seizure arose.

for the quashing of a Search Warrant and for the return of the articles seized was interlocutory and not appealable. *Coastwise Lumber & Supply Co.* vs. *U. S.*, *supra*. Singularly the reasoning of the Court in that case is similar to the reasoning by the Court at bar and the Court in its opinion (R., 17) recognizes the difference created by the decision of *Steele* vs. *U. S.*, *supra*. The fact that the order at bar did not involve a search warrant proceeding is seized upon as a distinguishing feature (R., 17).

Steele v. United States Was Misunderstood by the Court Below, as its Opinion Shows.

In the *Steele* case the applicant's property had been seized under a search warrant issued by a commissioner. After the seizure the warrant was traversed by Steele, but the commissioner sustained the warrant. Steele was later indicted, and then he applied to the District Court for an order vacating the search warrant and returning the property seized thereunder. This application was denied by a judge of the District Court who was *not* the judicial officer who had issued the warrant. Steele appealed from the order denying the application, and this Court reviewed the matter on the merits.

Now the opinion of the Court below shows that it misunderstood the *Steele* case. It said (R., 16):

> "Under Section 16 of the Search Warrant Act upon the return of the executing officer the judge or commissioner allowing the writ is to restore property unlawfully seized. Such an order was treated *sub silentio* as a 'final decision' in *Steele* v. *United States*. * * *."

But the order appealed from was *not* the order of the judge or commissioner who had allowed the writ. A

commissioner had allowed the writ but the order appealed from was made by a judge in a proceeding brought in the District Court, and in the criminal case.*

Thus in the *Steele* case an order refusing to return seized property, the order having been made in a special proceeding in the criminal case, indictment pending, was reviewed on appeal—and the case is misunderstood by the Court below, which thinks that the order appealed from was the order of the judge who allowed the writ, and made by that judge in the course of proceedings provided for in the Espionage Act and described on page 501 of 267 U. S.*

In *Trustees* v. *Greenough*, 105 U. S. 527, plaintiff sued to set aside certain fraudulent conveyances. A fund came into the hands of the Court and its distribution was objectionable to plaintiff. The litigation being undetermined, he appealed from an order of distribution. This Court said:

> "The order is certainly a final one of the particular matter arising upon the petition for allowance. Though incidental to the cause, the inquiry was a collateral one, and receiving a final decision that the main suit might continue for years. We think the proceedings may be regarded as so far independent as to make the decision substantially a final decree for the purpose of an appeal."

*The docket of the District Court in the *Steele* case shows the following entries:

October 20, 1923—Information Filed. (Possession of Intoxicating Liquor)
October 22, 1923—Defendant Pleads Not Guilty.
October 31, 1923—Motion to set aside and Vacate Search Warrant and for the return of Property Returnable Nov. 5th, 1923.
November 7, 1923—Motion Denied—Wenslow, J.
March 12, 1924—Trial—Verdict Guilty—Fine $500.00.

*These facts are not entirely clear from the opinion of the Court, but counsel has examined the record and can assure this court that the facts here stated are correct.

In *Williams* v. *Morgan*, 111 U. S. 699, the Court, speaking of an appeal from an order fixing the fee of a trustee in an unfinished case, said:

> "It was in its nature final, and was made a matter distinct from the general subject of litigation."

In *Brush* v. *Electric Imp. Co.*, 51 Fed. 557 (C. C. A. 9th), a plaintiff who had unwillingly been joined as a party, moved to dismiss and this motion was overruled. Upon appeal the Court said:

> "We reach the conclusion that the term 'final decision' in said statute under consideration does not mean necessarily such decisions or decrees only which finally determine all the issues presented by the pleadings; that, while these are undoubtedly final decisions, the terms are not limited to them, *but also apply to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles that controversy.*"

The Court held the order appealable.

This doctrine has recently been affirmed in *United States* vs. *River Rouge Co.*, 269 U. S. 411, 414, where the Court said:

> "While the general rule requires that a judgment of a Federal Court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation * * *."

In this case the controversy as a whole is between the United States on one hand, and Cogen and others on the other, and the issue is whether the defendants are guilty of the crime of conspiracy.

Such being the general controversy, this particular matter is to determine, and only determine whether the United States Attorney or Cogen is rightfully entitled to certain seized papers.

In *Forgay* vs. *Conrad*, 6 How. 201, 203, 204, 12 L. Ed. 404, the Court said:

> "The question upon the motion to dismiss is whether this is a final decree, within the meaning of the Acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature."
>
> "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.
>
> "This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like descrip-

> tion. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree. The case before us, however, comes within the rule above stated, and the motion to dismiss is therefore overruled."

In *Segurola* v. *United States*, *supra*, this Court referred to a controversy of this kind in the following language:

> "The Court will not in trying a criminal cause permit a *collateral issue* to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which happened to cross the path of such litigation and which is *wholly independent* of it."

These are the general principles. We shall now discuss cases applying these rules to applications for the return of seized property.

Controlling Authorities Distinguished on Untenable Grounds.

This Court has four times held orders granting or refusing applications for the return of papers or property final and appealable. *Perlman* v. *United States*, 247 U. S. 7, *Burdeau* v. *McDowell*, 256 U. S. 465, *Essgee Company* v. *United States*, 262 U. S. 151, and *Steele* v. *United States*, 267 U. S. 498.

The Court below has not to any appreciable extent discussed the theory of this Court in those decisions or

discussed the true nature of "final" orders, but has rather endeavored to demonstrate, by refined analysis, that this case is not in all respects the same as those, failing, nevertheless, to give reasons why the distinctions discovered should control.

Classes of Orders Conceded to be Final and Appealable.

The Court below concedes:

1. That where an application is made for the return of seized property then in the possession of prosecuting officers, and at the time no indictment against the applicant is pending, an order granting or denying the application is final and appealable. *Perlman* v. *United States, supra*; *Burdeau* v. *McDowell, supra*.

2. That where an application is made for the return of property seized under a search warrant, and an indictment is pending against the applicant, an order granting or denying the application is final and appealable. *Steele* v. *United States, No. 1, supra*.

3. That where an application is made for the return of property produced under a subpoena *duces tecum*, and an indictment is pending, an order granting or denying the application is final and appealable. *Essgee Co.* v. *United States, supra*.

BUT, SAYS THE COURT BELOW, IF AN INDICTMENT IS PENDING, AND NO COURT WRIT HAD BEEN ISSUED, THE ORDER IS INTERLOCUTORY AND NOT APPEALABLE.

Pendency of an indictment is no more material where a court writ hasn't issued than where it has, and the Sixth Circuit Court of Appeals has so held.

In *Perlman v. United States*, exhibits produced by Perlman upon the trial of a civil case were impounded by an order of the Court. Thereafter the United States Attorney applied for possession of the exhibits as material and necessary "*in an investigation pending before the grand jury*" (247 U. S. 10), and in response the Court issued an order affording the United States Attorney access to the exhibits and directing the Clerk of the Court to produce the exhibits before the Grand Jury upon the United States Attorney's demand. Thereafter Perlman prayed that the use of the exhibits by the United States Attorney be forbidden. The prayer was denied by an order of the District Court from which Perlman sued out a writ of error.

The Court said (247 U. S. 12, 13):

> "The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending on it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur."

That is, the order authorizing the United States Attorney to use the exhibits in the "investigation pending before the grand jury" was final.

PERLMAN DID NOT HAVE TO WAIT UNTIL THE PENDING PROCEEDING HAD RESULTED IN A JUDGMENT OF CONVICTION AGAINST HIM BEFORE SEEKING REVIEW

In *Burdeau* v. *McDowell*, *supra*, the Court said (p. 475):

> "The exact question to be decided here is: May the Government retain incriminating papers, coming to it in the manner described, with a view to their use in a subsequent investigation by a Grand Jury where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned?"

This Court reviewed and reversed the District Court order granting a return of the papers.

Although of course no proceeding was pending at the time of the application the Court below goes a long way in saying that the *Burdeau* case does not hold that an order granting or denying return of seized papers is not a final order. Certainly the spirit and tenor of the *Burdeau* and *Perlman* cases is that such an application is a special proceeding, and that the order determining who is entitled to the papers or other property is final.

IS THERE A WORD IN EITHER OPINION THAT INTIMATES THAT IF AN INDICTMENT HAD BEEN PENDING THE REVIEW WOULD BE IMPOSSIBLE? THE COURT CITES NONE AND COUNSEL HAS FOUND NONE.

Our view is confirmed by two opinions of the Circuit Court of Appeals for the Sixth Circuit, in *McDaniel* v. *United States*, 294 Fed. 769, and *Dowling* v. *Collins*, 10 Fed. (2d) 62.

In the *McDaniel* case a federal postal inspector obtained from an Indiana state court a search warrant directed to a municipal police officer. McDaniel's papers were seized under this search warrant. He was indicted and tried. Upon the trial he objected to the introduction in evidence of these papers upon the ground that the search and seizure had been in violation of his Constitutional Rights. The Court stated the rule that a Court will not interrupt a trial to inquire into how evidence otherwise admissible was obtained, and then said:

"It was held that a departure from the rule was justified if the search and seizure were in fact made by United States officers or agents in violation of the Fourth Amendment and a seasonable and timely application were made in advance of trial for the suppression of evidence thus wrongfully obtained and for a return of the seized documents. However, it has been later held in *Perlman* v. *United States*, 247 U. S. 7, 38 Sup. Ct. 417, 62 L. Ed. 950, *that an order granting or refusing such an application is a final and appealable order*, and in *Burdeau* v. *McDowell*, 256 U. S. 465, 41 Sup. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159, *an appeal from such an order was permitted on behalf of the government*. If there is an inconsistency in permitting a final and appealable order to be later re-examined collaterally and disregarded, it seems to have passed unnoticed" (294 Fed. 769, 774).

Although not in so many words the Court plainly shows that it regards the *Perlman* and *Burdeau* cases as holding that orders on such applications, if made in advance of *trial*, not of indictment, and not involving the District Court's own writ (it was a *state* court search warrant) are final and appealable.

Again in the *Hoeling* case, *supra*, the Sixth Circuit Court of Appeals showed the same opinion.

In the District Court for the Eastern District of Kentucky, a defendant in a criminal case, *indictment pending*, moved separately for the return of property seized under a search warrant and the suppression of its use as evidence. The two motions were joined, and an order denying both motions on the merits was entered. The defendant was subsequently tried, but the outcome of the trial does not appear.

Thereafter defendant applied to the Court for the return of this property. The District Court denied the

application on the ground that the prior order, being final and appealable was *res adjudicata*.

This view was sustained by the Sixth Circuit Court of Appeals. It said (10 Fed. (2d) 62, 64):

> "The reasoning of the opinion in *Perlman* v. *United States*, 247 U. S. 7, as well as in *Burdeau* v. *McDowell*, 256 U. S. 465, fully supports the conclusion that *the orders on the preliminary motions and petitions in the criminal case were final and as such reviewable in this Court, though entitled in that case they were no essential part of the trial thereon; as preliminary matters they were as independent therefrom as were the petitions in the Perlman and Burdeau cases.*"

Concededly at the time the preliminary application was denied an indictment against the applicant was pending.

The Court below has distinguished the *Harding* case on the ground that the order was final because the vacating of a search warrant was involved. Yet the Sixth Circuit Court of Appeals relied *solely* on decisions of this Court *not involving search warrants or other writs* in holding the order final.

The Court below also distinguishes *Harding* v. *Collins*, by saying that the property there involved had a value other than evidentiary. The property was contraband liquor which certainly has no marketable value. Books and papers of account have no marketable value, but they are extremely valuable to their owners. Where is the line to be drawn? The suggestion of the Court below is a novel one and finds no support in any authority counsel could discover, and certainly finds none in the cases here discussed.

In the *Essgee Company* case a subpoena *duces tecum* had been served on an officer (one Schratter) of a corporation, commanding him to produce certain corporate

papers at the U. S. Courthouse. This he did, and left them on a table where the United States Attorney found them and took them. The papers were brought before the Grand Jury and Schratter was subsequently indicted. Indictment pending Schratter applied for a return of the papers. The decision on the application seems to have involved the propriety of the subpoena, but the application was certainly not directed at the subpoena nor did it involve vacating, quashing or otherwise disposing of the subpoena. It was purely and simply an effort to get back papers which the United States Attorney had for the purpose of prosecuting the applicant.

The Court below has said (R., 17):

> "* * * the case is in any event to be distinguished in that the motion was for the determination of a proceeding commenced by the court's writ."

The determination was *not* of a proceeding commenced by the court's writ.

The proceeding had been commenced by the appellant's application for the return of papers which the United States Attorney had; he happened to have them because of a subpoena served months before.

The Court's implication is that the proceeding was one to vacate a court's writ, but, of course, that is not the case.

The *Segurola* case shows that this Court attaches no importance to the pendency of an indictment or connection with a court writ.

In *Segurola* v. *United States*, *supra*, this Court showed that it did not consider applications for the return of seized property as any more an integral part of a

main criminal case when no search warrant, subpoena or other writ was involved. In that case Segurola had been searched without a warrant and property in his possession seized. Without previous application he objected to its introduction at the trial.

This Court said:

> "The Court will not in trying a criminal case permit a *collateral* issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which happened to cross the path of such litigation and *which is wholly independent of it.*"

In an involved suit it is not unusual that a controversy arises between some or all of the parties on a matter separate from the issues raised by the pleading. In equity receiverships, for instance, such separate controversies are constant—this or that property is sold, allowances are made, and so on. The final determination of the Court of first instance in these incidental matters is appealable.

Under the doctrine of this Court in that well known series of cases, *Boyd* v. *United States*, 116 U. S. 616, *Weeks* vs. *United States*, 232 U. S. 383, *Gouled* v. *United States*, 255 U. S. 298 and others, applications for the return of property possessed by prosecuting officers, have become well-defined proceedings of frequent occurrence in the District Courts. Sometimes these applications are made before indictment, sometimes after. Sometimes the applicant is the only person proceeded against, or to be proceeded against (*Perlman* case); sometimes, as here, only one of the defendants is interested in the application. Sometimes the property in question has been obtained under a search warrant; sometimes because a party has been coerced by subpoena; sometimes it has merely been seized, as here, and as in the *Segurola* case.

In the *Essgee Company* case these proceedings were briefly described as follows (p. 152):

> "The review sought is of an order of the District Court in which no jury can intervene. It likens itself in its appellate character to a review of cases in equity or admiralty in which issues of fact are triable to the court, and in which the review may properly involve a re-examination by the reviewing court of the whole record of the court upon both the law and the evidence therein."

These proceedings determine who, as between the prosecuting officer and the applicant, is entitled to the property, the subject matter of the application. It is quite apart from the general issue—which here is whether or not petitioner and others were conspirators against the laws of the United States.

The opinion of the Court below shows it has confused these principles. A controversy does not become the less a special proceeding because some more important issue is pending between the parties, nor does the incidental fact that the merit of some court writ is questioned introduce some strange magic which gives the order determining the controversy an appealable character.

The theory urged by counsel harmonizes the decisions of the Court and has been adopted by the Circuit Court of Appeals of the Sixth Circuit.

Whatever may be said as to factual distinctions between this case and *Doubling* v. *Collins*, it is clear from the opinion in that case that the Circuit Court of Appeals of the Sixth Circuit regards orders on applications for the return of property seized as final and appealable.

We quote again from the *Doubling* case (p. 64):

> "The reasoning of the opinion in *Perlman* v. *United States*, 247 U. S. 7, as well as in *Burdeau*

> v. *McDowell*, 256 U. S. 465, fully supports the conclusion that the orders on the preliminary motions and petitions in the criminal case were final and as such reviewable in this court; though entitled in that criminal case, they were no essential part of the trial therein; as preliminary matters they were as independent therefrom as were the petitions in the *Perlman* and *Burdeau* cases."

In the *Dowling* case an indictment was pending at the time the application was made. By citing decisions of this Court in cases in which no indictment was pending at the time of the order, the Court shows that it does not think the pendency of an indictment changes the final character of the order. Although a writ was involved in the *Dowling* case, no writ was involved in the authorities cited, so that the Sixth Circuit Court of Appeals does not think that a material feature.

Although presumably a defendant could eventually obtain review on the merits in an Appellate Court, the same can not be said of the Government.

If an application like the present is granted, in very many cases it will mean that the evidence is insufficient to obtain a conviction and the prosecution will fail, unless the order is reversed.

But if appeal does not lie, the order can not be reversed and the prosecution will fail without the Government's having had an opportunity for review.

Take *Burdeau* v. *McDowell*. Suppose there the application had not been made until after indictment. In that case the District Judge granted the application. The Government would never have been able to obtain review and the prosecution would have failed, and wrongfully, because the District Court's order was erroneous.

The present decision in connection with the rule recently insisted upon in *Segurola v. United States* will cause confusion.

In *Segurola* v. *United States*, *supra*, it appeared that property of a defendant in a criminal case had been seized at the time of his arrest, unconstitutionally, he thought. There was no search warrant. At the time of the trial he objected to the seizure for the first time by opposing the introduction of this property in evidence, but it was admitted. This Court said:

> "* * * The court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which happened to cross the path of such litigation and which is wholly independent of it. In other words in order to raise the question of illegal seizure, and an absence of probable cause in that seizure, the defendants should have moved to have the liquor returned to them as their property and as not subject to seizure or use as evidence."

Let us suppose the defendant does make such a motion and it is denied.

Then, how is the defendant to obtain review?

He cannot raise the question at the trial so his bill of exceptions will not show his grievance.

Nor, if the decision of the Court below is right may he appeal direct.

Suppose the defendant is acquitted at the trial.

How is he to get his property back? He cannot appeal from the order denying his application; he cannot appeal from a judgment of acquittal.

Suppose the defendant is convicted. There is great uncertainty, as outlined above, as to how to protect his rights.

Moreover, it is extremely difficult, if not impossible, for the petitioner to protect the rights given him under the decision of this Court in *Silverthorn Lumber Company* v. *United States*, 251 U. S. 385, the doctrine of which case forbids prosecuting officers not only to introduce wrongfully seized property, but to use in a prosecution information which they may have derived from property wrongfully seized. How is the petitioner Cogen to know when testimony is produced at the trial whether or not the Government was able to obtain such testimony from information which it obtained by examining these papers? If the petitioner Cogen's rights are to be fully protected it will be necessary, continually, to inquire whether or not the testimony offered was so obtained, and, certainly, such inquiries would cause "halts in the orderly progress of a cause" more disturbing and more embarrassing than those which this Court said in the *Segurola* case must be avoided.

The government presented a brief in opposition to the application for certiorari herein and argued that the decision of the Court below was right. The theory advocated by the Government was adopted by Judge Manton in his concurring opinion. This theory was expressly rejected by the majority of the Court.

This theory is, quoting from page 4 of the Government brief in opposition to certiorari, that:

> "Where an application for the return of seized property and for its suppression as evidence is in substance and effect a proceeding in a pending case, *as distinguished from a proceeding begun by an independent petition*, the order granting or denying the relief prayed is but interlocutory in a pending case and therefore not appealable."

The opinion of Judge Learned Hand reads, (R., 16):

> "This case comes up upon motion in the criminal prosecution then pending, and while *we attach no significance to the way the papers are entitled*, it is plain that *unless the motion lay as an independent proceeding*, it was but a step in the defense and the order is not a 'final decision.'"

Judge Manton in his separate opinion agreed with the Government's present contention,* saying (R., 18):

> "The application for their return as unlawful in violation of the constitutional rights of this plaintiff in error was prosecuted as an incident to the pending criminal proceedings. If it were an independent proceeding, the order is final and appealable."

The distinction is highly important. If the Government and Judge Manton are right, persons deprived of property are entitled to appellate review if they proceed in the right way, even if indictment is pending and no court writ involved.

Different Treatment of the *Essgee* Case.

This distinction is strikingly illustrated by the different ways in which Judge Hand and the Government treat *Essgee Co.* v. *United States*, 262 U. S. 151. In this case a Grand Jury subpoena *duces tecum* had been served on the Essgee Company. No one appeared before the Grand Jury but an officer of the corporation left papers in a room in the Courthouse, where the District Attorney found them. Months later the corporation was indicted and then petitioned for a return of the papers. The petition was not directed at the sub-

*The case was argued for the Government on a different basis in the Court below.

poena, but in the petition the claim was made that the subpoena was invalid. The order in the case was reviewed by this Court on appeal.

Now, Judge Hand, distinguishes the *Essgee* case from the present on the ground that it was an order disposing of a court writ. We believe we have already shown that Judge Hand was wrong on his facts in making this distinction; apparently the Government thinks little of this theory, but relies upon the difference in procedure. We quote below the varying treatments of the *Essgee* case in parallel columns:

Government Brief in opposition to Certiorari (page 9, Brief):

"In *Essgee Co.* v. *United States*, the petitions for the return of books and papers were filed after indictments had been returned against petitioners. The petitions were not entitled as in the criminal cases, however, but were plainly intended by the petitioners and treated by the court as the beginning of new and independent proceedings. The orders denying the petitions were, therefore, obviously final and reviewable in this Court."

Judge Hand (R., 17, Opinion, C. C. A.):

"In *Essgee Company* v. *U. S.*, 262 U. S. 151, an order was reviewed which after indictment denied the return of papers produced in compliance with a subpoena *duces tecum* issued by the Grand Jury. The point was again assumed without discussion, and the case is in any event to be distinguished in that the motion was a determination of a proceeding commenced by the court's writ. In this regard it was like a search warrant, though issuing as of course. No doubt a court has always supervision over the execution of its writs, *Wise* v. *Henkel*, 220 U. S. 556, 558, and its orders may perhaps be treated as final which dispose of them."

In page 11 of the Government Brief in opposition to certiorari it is claimed that no question of jurisdiction was raised in the *Essgee* case. This is erroneous as the first point raised by the Solicitor-General was that the order was interlocutory and not reviewable.

Different Treatment of the *Steele* Case; but Both the Government and Judge Hand Wrong on the Facts.

The *Steele* case is also distinguished on different grounds; Judge Hand on the court writ theory, the Government on the independent petition theory. We believe Judge Hand entirely wrong on his facts in his differentiation of the *Steele* case—the order was *not* made on the return of the executing officer to the judge or commissioner allowing the writ.

The Government is also wrong on its facts, but on different facts. The application in the *Steele* case was made on affidavits in the same manner that this case was. The moving paper appears on page 4 of the Record in this Court in that case. It is called "Notice of Motion" and reads as follows: "Upon the annexed petition* of Meyer Kraushaar, verified the 30th day of October, 1923, and upon the affidavit of Isidor Einstein, etc. * * * the undersigned will *move this Court* * * * on the fifth day of November, 1923 * * * for an order" granting the relief prayed, and is addressed to the United States Attorney and Commissioner Hitchcock.

The proceeding was certainly not an appellate one; it was a motion on affidavits and deposition, for the return of property.

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*Although called a petition it is in affidavit form, annexed to the notice of motion and certainly is not a pleading in Steele's name.

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*The motion was furthermore returnable in the Courtroom for criminal motions, not the one for civil motions.

Different Results Reached in Applying Theories of Government and of the Court Below.

According to the Government and Judge Manton the following orders are final:

Orders made in entirely separate equitable cases, irrespective of court writs involved, or the pendency of indictments.

According to the majority of the Court below the following are final:

Orders in independent equitable actions, *where no indictment is pending.*

Orders made on motion or in entirely separate equitable cases, if involving a court writ.

But orders made in separate equitable cases are interlocutory if no court writ is involved and an indictment is pending.

THE WHOLE POINT OF THE *SEGUROLA* CASE WILL BE LOST IF THE GOVERNMENT'S CONTENTION IS UPHELD.

On page 11 of the Government brief in opposition to certiorari it is pointed out that if petitioner is right, and the order is final, "all questions involving the validity of the seizure would be *res adjudicata* and could not again be passed on by the court in considering objections at the trial."

This is exactly what we contend, and we think it is necessarily involved in the decision in the *Segurola* case.

The Court in that case, if we understand it correctly, intended to prevent the disturbance of the progress of criminal trials by long inquiries into the competency of evidence offered. Clearly such disturbance can only be prevented if the question has been finally settled. We do not regard, as the Government seems to, a preliminary application as a sort of ritual to be gone through with if one is to be in a position to object to evidence

at the trial, and then go through the whole thing over again, yet that is the only basis upon which the Government's theory that these orders are not final can be reconciled with the firm requirement of this Court that a preliminary application be made.

For instance, if the order in this case is not final then the whole question will have to be gone into at the trial, and evidence taken on the issue of probable cause,* if petitioner's rights are to be protected. This is clearly inconsistent with the theory of the *Segurola* case and if unreversed, makes it difficult to see how this petitioner's rights can be protected.

The following language of this Court in the *Steele* case supports our theory (p. 507):

> "It should first be said that *Steele* is not in a position to raise this question. He might have raised it in the preceding case, but he did not do so, and did not assign error on account of it in his appeal to this Court. *The refusal to vacate the Search Warrant and to return the liquor seized was a final decree. The question is therefore res adjudicata as against him.*"

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed.

SANFORD H. COHEN,
Attorney for Petitioner,
217 Broadway,
New York City.

*Counsel was present at a criminal trial in the District Court of the United States for the Southern District of New York when the Court spent a whole day inquiring into the source of evidence, bound it supposed, by the *Amos* case.

FILED
APR 6 1928
CHARLES ELMORE CROPLEY
CLERK

No. 833 89

In the Supreme Court of the United States.

OCTOBER TERM—1927.

J. ROBERT COGEN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

In the Matter
of
The Application for the return of certain papers, cards, memoranda and books, and other papers and memoranda seized from the person of the defendant, J. ROBERT COGEN, and for the suppression of all evidence obtained therefrom.

PETITIONER'S REPLY BRIEF.

POINT I.

The Government brief, arguing that the Court below was right, but for the wrong reason, shows the confusion with which this subject is surrounded.

The theory of the Government brief may be correct, which we strenuously deny, but if it is the majority of

the Court below is wrong, and an erroneous rule on an important feature of federal practice has been established in the Second Circuit.

The theory advocated by the Government was adopted by Judge Manton in his concurring opinion, but expressly rejected by a majority of the Court.

This theory is, quoting from page 4 of the Government brief, that:

> "Where an application for the return of seized property and for its suppression as evidence is in substance and effect a proceeding in a pending case, *as distinguished from a proceeding begun by an independent petition*, the order granting or denying the relief prayed is but interlocutory in a pending case and therefore not appealable."

The opinion of Judge Learned Hand reads:

> "This case comes up upon motion in the criminal prosecution then pending, and while *we attach no significance to the way the papers are entitled*, it is plain that *unless the motion lay as an independent proceeding*, it was but a step in the defense and the order is not a 'final decision.'"

Judge Manton in his separate opinion agreed with the Government's present contention,* saying:

> "The application for their return as unlawful in violation of the constitutional rights of this plaintiff in error was prosecuted as an incident to the pending criminal proceedings. If it were an independent proceeding, the order is final and appealable."

*The case was argued for the Government on a different basis in the Court below.

The distinction is highly important. If the Government and Judge Manton are right, persons deprived of property are entitled to appellate review if they proceed in the right way, even if indictment is pending and no court writ involved.

a. Different Treatment of the *Essgee* case.

This distinction is strikingly illustrated by the different ways in which Judge Hand and the Government treat *Essgee Co.* v. *United States*, 262 U. S. 151. As explained in our main brief, in this case a Grand Jury subpoena *duces tecum* had been served on the Essgee Company. No one appeared before the Grand Jury but an officer of the corporation left papers in a room in the Courthouse, where the District Attorney found them. Months later the corporation was indicted and then petitioned for a return of the papers. The petition was not directed at the subpoena, but in the petition the claim was made that the subpoena was invalid. The order in the case was reviewed by this Court on appeal.

Now, Judge Hand, distinguishes the *Essgee* case from the present on the ground that it was an order disposing of a court writ, we believe we have already shown that Judge Hand was wrong on his facts in making this distinction; apparently the Government thinks little of this theory, but relies upon the difference in procedure. We quote below the varying treatments of the *Essgee* case in parallel columns:

Government Brief (page 9, Brief):	Judge Hand (page 33, Opinion, C. C. A.):
"In *Essgee Co.* v. *United States*, the petitions for the	"In *Essgee Company* v. *U. S.*, 262 U. S. 151, an

return of books and papers were filed after indictments had been returned against petitioners. The petitions were not entitled as in the criminal cases, however, but were plainly intended by the petitioners and treated by the court as the beginning of new and independent proceedings. The orders denying the petitions were, therefore, obviously final and reviewable in this Court."

order was reviewed which after indictment denied the return of papers produced in compliance with a subpoena *duces tecum* issued by the Grand Jury. The point was again assumed without discussion, and the case is in any event to be distinguished in that the motion was a determination of a proceeding commenced by the court's writ. In this regard it was like a search warrant, though issuing as of course. No doubt a court has always supervision over the execution of its writs, *Wise v. Henkel*, 220 U. S. 556, 558, and its orders may perhaps be treated as final which dispose of them."

In the Government Brief (p. 11) it is claimed that no question of jurisdiction was raised in the *Essgee* case. This is erroneous as the first point raised by the Solicitor-General was that the order was interlocutory and not reviewable.

b. Different Treatment of the *Steele* case; but both the Government and Judge Hand wrong on the facts

The *Steele* case is also distinguished on different grounds; Judge Hand on the court writ theory, the

Government on the independent petition theory. As pointed out in our main brief we believe Judge Hand entirely wrong on his facts in his differentiation of the *Steele* case—the order was *not* made on the return of the executing officer to the judge or commissioner allowing the writ.

The Government is also wrong on its facts, but on different facts. The application in the *Steele* case was made on affidavits in the same manner that this case was. The moving paper appears on page 4 of the Record in this Court. It is called "Notice of Motion" and reads as follows: "Upon the annexed petition* of Meyer Kraushaar, verified the 30th day of October, 1923, and upon the affidavit of Isidor Einstein, etc. * * * the undersigned will *move this Court** * * * on the fifth day of November, 1923 * * * for an order" granting the relief prayed, and is addressed to the United States Attorney and Commissioner Hitchcock.

The proceeding was certainly not an appellate one; it was a motion on affidavits and deposition, for the return of property. We must therefore respectfully ask the Court to read page 10 of the Government Brief in connection with what has been said here.

c. Different Results reached in Applying theories of Government and of the Court below.

According to the Government and Judge Manton the following orders are final:

Orders made in entirely separate equitable cases, ir-

*Although called a petition it is in affidavit form, annexed to the notice of motion and certainly is not a pleading in Steele's name.

*The motion was, furthermore, returnable in the Courtroom for criminal motions, not the one for civil motions.

respective of court writs involved, or the pendency of indictments.

According to the majority of the Court below the following are final:

Orders in independent equitable actions, *where no indictment is pending.*

Orders made on motion or in entirely separate equitable cases, if involving a court writ.

But orders made in separate equitable cases are interlocutory if no court writ is involved and an indictment is pending.

POINT II.

The Government has overlooked the *Segurola* case and its doctrine.

We have taken up *Segurola* v. *United States*, not yet reported, at some length in our main brief but the Government has not seen fit to mention it.

On pages 7, 8 and 9 of our main brief we discussed some of the leading cases in which orders in pending cases were held reviewable, and pointed out how this Court's definition of the issue involved an application for the return of seized property exactly match definitions of issues, the orders settling which were held final and reviewable.

The contrast between the attitude of the *Segurola* case and that of the Government brief is shown, we believe by comparing the following quotations:

Government Brief (pp. 8-9 Brief):	This Court:
"Petitioner cites *Trustees* v. *Greenough*, 105	"The Court will not in trying a criminal cause

U. S. 527; *United States* v. *River Rouge Co.*, 269 U. S. 411, and other cases, as instances in which orders rendered in pending cases were held subject to review. In those cases, however, the particular matter decided was *plainly severable* from the other issues in litigation, whereas in the instant case the motion denied by the District Court would, if granted, prevent the use of evidence without which it would be useless to proceed."

permit a *collateral* issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider *incidentally* a question which happened to cross the path of such litigation and which is *wholly independent* of it."

What is the distinction between "wholly independent" and "plainly severable"?

And this Court says that in the *Segurola* case "the defendants should have *moved*" for a return of the seized property.

POINT III.

The whole point of the *Segurola* case will be lost if the Government's contention is upheld.

On page 11 of the Government brief it is pointed out that if petitioner is right, and the order is final, "all questions involving the validity of the seizure would be *res adjudicata* and could not again be passed on by the court in considering objections at the trial."

This is exactly what we contend, and we think it is necessarily involved in the decision in the *Segurola* case.

The Court in that case, if we understand it correctly, intended to prevent the disturbance of the progress of criminal trials by long inquiries into the competency of evidence offered. Clearly such disturbance can only be prevented if the question has been finally settled. We do not regard, as the Government seems to, a preliminary application as a sort of ritual to be gone through with if one is to be in a position to object to evidence at the trial, and then go through the whole thing over again, yet that is the only basis upon which the Government's theory that these orders are not final can be reconciled with the firm requirement of this Court that a preliminary application be made.

For instance, if the order in this case is not final then the whole question will have to be gone into at the trial, and evidence taken on the issue of probable cause,* if petitioner's rights are to be protected. This is clearly inconsistent with the theory of the *Segurola* case, and as we observed in our main brief (pp. 21-22) that case, in connection with the decision below, if unreversed, makes it difficult to see how this petitioner's rights can be protected.

The following language of this Court in the *Steele* case supports our theory:

> "It should first be said that *Steele* is not in a position to raise this question. He might have raised it in the preceding case, but he did not do so, and did not assign error on account of it in his appeal to this Court. *The refusal to vacate the*

*Counsel was present at a criminal trial in the District Court of the United States for the Southern District of New York when the Court spent a whole day inquiring into the source of evidence, based it supposed, by the *Amos* case.

Search Warrant and to return the liquor seized was a final decree. The question is therefore res adjudicata as against him."

The want of uniformity that would exist if the decision below stands is, certainly, highly undesirable.

POINT IV.

The Court below, the Court of Appeals of the Sixth Circuit, and the Solicitor-General's office all disagree on point here involved.

If, contrary to our contention, the Government is right, the Court below is wrong in one respect; and the Court of Appeals of the Sixth Circuit (*Dowling* case) doubly wrong. And on any basis, as the Government concedes, the Court below is in disagreement with the Sixth Circuit on important feature of federal practice, and the Government in disagreement with both.

Respectfully submitted,

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CHARLES DICKERMAN WILLIAMS,
Counsel.

MAR 9 1

No. [redacted] 89

In the Supreme Court of the United States.

OCTOBER TERM—1927.

J. ROBERT COGEN,
Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error.

IN THE MATTER
OF

The Application for the return of Certain papers, cards, memoranda and books, and other papers and memoranda seized from the person of the defendant, J. ROBERT COGEN, and for the suppression of all evidence obtained therefrom.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SANFORD H. COHEN,
Attorney for Petitioner,
Office & P. O. Address,
217 Broadway,
Borough of Manhattan,
City of New York.

CHARLES DICKERMAN WILLIAMS,
Counsel.

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The Application for the return of Certain papers, cards, memoranda and books, and other papers and memoranda seized from the person of the defendant, J. ROBERT COGEN, and for the suppression of all evidence obtained therefrom.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, J. ROBERT COGEN, respectfully submits his petition for a writ of certiorari to review the

decree of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case.

The Circuit Court of Appeals for the Second Circuit has dismissed an appeal (or writ of error) from an order of the District Court of the United States for the Southern District of New York denying petitioner's motion for a return of papers taken from his person by prohibition agents, and for the suppression of evidence obtained therefrom.

Statement of Case.

On May 4, 1927, at 1435 Madison Avenue, New York City, prohibition agents without a warrant of any kind searched the person of the petitioner and found various papers. These they seized (fols. 16-17). Some or all of these papers were delivered to the United States Attorney.

Sometime later, it does not appear when, petitioner and others were indicted in the District Court of the United States for the Southern District of New York on a charge of conspiracy. While this indictment was pending petitioner applied in that court for the return of the papers seized and for the suppression of evidence that the United States Attorney might have obtained therefrom, alleging that the search and seizure had been in violation of his constitutional rights (fols. 21-24).

This application was heard by the Hon. Frank J. Coleman, and by him denied in an order of court dated January 12, 1928 (fols. 61-66).

From this order petitioner took a writ of error to the United States Circuit Court of Appeals for the Second Circuit.

The Court of Appeals on February 20, 1928, dismissed the "appeal" (Act of January 31, 1928) on the

sole ground that the order of the District Court was interlocutory and not appealable. The merits were not discussed. The opinion of the Court was by Judge Learned Hand. Judge Manton wrote a concurring opinion.

Single Question Presented.

The record presents one question only:

> Is an order of a District Court granting or refusing an application for the return of seized property, not involving the vacating of a search warrant and made during the pendency of a criminal charge against the applicant, final and appealable?

The decision of the Circuit Court of Appeals conflicts with the theory of four decisions of this Court, and with two of the Court of Appeals of the Sixth Circuit: the question decided is most important.

In *Perlman* v. *United States*, 247 U. S. 7, *Burdeau* v. *McDowell*, 256 U. S. 465, *Essgee Company* v. *United States*, 262 U. S. 151, and *Steele* v. *United States*, 267 U. S. 498, this Court reviewed on the merits orders of District Courts granting or denying applications for the return of seized property.

Those cases are distinguished from the present by the Court below on the basis of technical factual differences having no relation to the theory of this Court's decisions or to the final character of the orders reviewed.

The same may be said as to the distinctions drawn by the Court below between this case and *Dowling* v.

Collins, 10 Fed. (2d) 62, decided by the Court of Appeals of the Sixth Circuit, the dictum of which squarely conflicts with the decision below. *McDaniel* v. *United States*, 294 Fed. 769, a previous decision of the Sixth Circuit Court of Appeals and also containing such dicta, is not referred to by the Court below.

The point involved should be settled by this Court. The enforcement of regulatory measures like the Anti-Narcotic Act and the Prohibition Act requires constant searches for and seizures of contraband, and in consequence temptations to enforcement officers to overstep and evade the restrictions of the Fourth Amendment, and many nice problems are presented as to when property seized must be surrendered. And so applications for the return of seized property have become a steady feature of the administration of justice in the federal courts.

The question of when decisions of District Courts on these applications can be reviewed is most important both to defendants and to the Government. The reversal of an erroneous decision will spare defendants the time, anxiety and expense that a trial, possible conviction and appeal will cost, and additional hazards will be added to the recovery of property unjustly seized. Even more important is the question to the Government. If an order on such an application made during the pendency of charges against the applicant are not final, then the Government can never obtain review of decisions adverse to it.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in said cause, to the end that

this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court and for such further relief as to this Court may seem proper.

J. Robert Cogen,

Sanford H. Cohen,
Charles Dickerman Williams,
Counsel.

Affidavit of Verification.

United States of America, }
State of New York, } ss.:
County of New York, }

J. Robert Cogen, being duly sworn, deposes and says: I am the petitioner in the above entitled action. I have read the foregoing petition and the same is true as I verily believe.

J. Robert Cogen.

Sworn to before me this
[illegible] day of March, 1928.

Certificate of Counsel.

We hereby certify that we have examined the foregoing petition for a writ of certiorari, and in our opinion such petition is well founded and should be granted by this Honorable Court, and said petition is not presented for purposes of delay.

Sanford H. Cohen,
Charles Dickerman Williams.

BRIEF IN SUPPORT OF PETITION.

POINT I.

Under decisions of this Court the order of the District Court was final and appealable.

a. Facts.

The material facts of this case are not in dispute and are as follows:

Without a warrant prohibition agents on May 4, 1927, searched the person of Cogen, the petitioner, found and seized various papers and delivered them to the United States Attorney for his use in prosecuting petitioner.

Thereafter petitioner and others were indicted in the United States District Court for the Southern District of New York on a charge of conspiracy.

While this indictment was pending, petitioner (only) applied to the District Court for the return of the papers and for the suppression of evidence obtained therefrom on the ground that the search and seizure had violated his constitutional rights.

An order denying this application was entered in the District Court on January 12, 1928.

Petitioner appealed* to the United States Circuit Court of Appeals for the Second Circuit, but the appeal was dismissed by that Court. In its opinion the Court said the District Court order was interlocutory and not appealable. The merits were not discussed.

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* Petitioner actually proceeded by writ of error. Apparently in view of the Act of January 31, 1928, the C. C. A. dismissed the "appeal". To avoid confusion of names, the word "appeal" will be used exclusively herein to describe the review proceeding.

b. By the definitions, the decision of this Court and analogy generally the order appealed from was final.

We submit and propose to show that:

An application for the return of property in the possession of prosecuting officers is a special proceeding, and if indictment is pending a special proceeding in the criminal case, and the order on the application finally determines the rights of the parties in the subject matter.

In *Trustees* v. *Greenough*, 105 U. S. 527, plaintiff sued to set aside certain fraudulent conveyances. A fund came into the hands of the Court and its distribution was objectionable to plaintiff. The litigation being undetermined, he appealed from an order of distribution. This Court said:

> "The order is certainly a final one of the particular matter arising upon the petition for allowance. Though incidental to the cause, the inquiry was a collateral one, and receiving a final decision that the main suit might continue for years. We think the proceedings may be regarded as so far independent as to make the decision substantially a final decree for the purpose of an appeal."

In *Williams* v. *Morgan*, 111 U. S. 689, the Court, speaking of an appeal from an order fixing the fee of a trustee in an unfinished case, said:

> "It was in its nature final, and was made a matter distinct from the general subject of litigation."

In *Brush* v. *Electric Imp. Co.*, 51 Fed. 557 (C. C. A. 9th), a plaintiff who had unwillingly been joined as a party, moved to dismiss, and this motion was overruled. Upon appeal the Court said:

> "We reach the conclusion that the term 'final decision' in said statute under consideration does not mean necessarily such decisions or decrees only which finally determine all the issues presented by the pleadings; that, while these are undoubtedly final decisions, the terms are not limited to them, *but also apply to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles that controversy.*"

The Court held the order appealable.

This doctrine has recently been affirmed in *United States* v. *River Rouge Co.*, 269 U. S. 411.

In this case the controversy as a whole is between the United States on one hand, and Cogen and others on the other, and the issue is whether the defendants are guilty of the crime of conspiracy.

Such being the general controversy, this particular matter is to determine, and only determine whether the United States Attorney or Cogen is rightfully entitled to certain seized papers.

In *Segurola* v. *United States*, decided November 12, 1927, this Court referred to a controversy of this kind in the following language:

> "The Court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and

consider incidentally a question which happened to cross the path of such litigation and which is wholly independent of it."

These are the general principles. We shall now discuss cases applying these rules to applications for the return of seized property.

c. Controlling authorities distinguished on untenable grounds.

This Court has *four times* held orders granting or refusing applications for the return of papers or property final and appealable. *Perlman* v. *United States*, 247 U. S. 7, *Bardeen* v. *McDowell*, 256 U. S. 475, *Essgee Company* v. *United States*, 262 U. S. 151, and *Steele* v. *United States*, 269 U. S. 498.

The Court below has not to any appreciable extent discussed the theory of this Court in those decisions or discussed the true nature of "final" orders, but has rather endeavored to demonstrate, by refined analysis, that this case is not in all respects the same as those, failing, nevertheless, to give reasons why the distinctions discovered should control.

d. Classes of orders conceded to be final and appealable.

The Court below concedes:

1. That where an application is made for the return of seized property then in the possession of prosecuting officers, and at the time no indictment against the applicant is pending, an order granting or denying the appli-

cation is final and appealable. *Perlman v. United States, supra; Burdeau v. McDowell, supra.*

2. That where an application is made for the return of property seized under a search warrant, and an indictment is pending against the applicant, an order granting or denying the application is final and appealable. *Steele v. United States, No. 1, supra.*

3. That where an application is made for the return of property produced under a subpoena *duces tecum*, and an indictment is pending, an order granting or denying the application is final and appealable. *Essgee Co. v. United States, supra.*

But, says the Court below, if an indictment is pending, and no court writ had been issued, the order is interlocutory and not appealable.

e. Pendency of an indictment is no more material where a court writ hasn't issued than where it has, and the Sixth Circuit Court of Appeals has so held.

In *Perlman v. United States* exhibits produced by Perlman upon the trial of a civil case were impounded by an order of the Court. Thereafter the United States Attorney applied for possession of the exhibits as material and necessary "*in an investigation pending before the grand jury*" (249 U. S. 10), and in response the Court issued an order affording the United States Attorney access to the exhibits and directing the Clerk of the Court to produce the exhibits before the Grand Jury upon the United States Attorney's demand. Thereafter Perlman prayed that the use of the exhibits by the United States Attorney be forbidden. The prayer

was denied by an order of the District Court from which Perlman sued out a writ of error.

The Court said:

> "The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending on it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur."

That is, the order authorizing the United States Attorney to use the exhibits in the "investigation pending before the grand jury" was final.

Perlman did not have to wait until the pending proceeding had resulted in a judgment of conviction against him before seeking review.

In *Burdeau* v. *McDowell*, *supra*, the Court said:

> "The exact question to be decided here is: May the Government retain incriminating papers, coming to it in the manner described, with a view to their use in a subsequent investigation by a grand jury where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned?"

This Court reviewed and reversed the District Court order granting a return of the papers.

Although of course no proceeding was pending at the time of the application the Court below goes a long

way in saying that the *Burdeau* case does not hold that an order granting or denying return of seized papers is not a final order. Certainly the spirit and tenor of the *Burdeau* and *Perlman* cases is that such an application is a special proceeding, and that the order determining who is entitled to the papers or other property is final.

Is there a word in either opinion that intimates that if an indictment had been pending the review would be impossible? The Court cites none and counsel has found none.

Our view is confirmed by two opinions of the Circuit Court of Appeals for the Sixth Circuit, in *McDaniel v. United States*, 294 Fed. 769, and *Dowling v. Collins*, 10 Fed. (2d) 62.

In the *McDaniel* case a federal postal inspector obtained from an Indiana state court a search warrant directed to a municipal police officer. McDaniel's papers were seized under this search warrant. He was indicted and tried. Upon the trial he objected to the introduction in evidence of these papers upon the ground that the search and seizure had been in violation of his constitutional rights. The Court stated the rule that a Court will not interrupt a trial to inquire into how evidence otherwise admissible was obtained, and then said:

> "It was held that a departure from the rule was justified if the search and seizure were in fact made by United States officers or agents in violation of the Fourth Amendment and a seasonable and timely application were made in advance of trial for the suppression of evidence thus wrongfully obtained and for a return of the seized documents. However, it has been later held in *Perlman v. United States*, 247 U. S. 7, 38 Sup. Ct. 417, 62 L. Ed. 950, *that an order granting or refusing such an applica*

tion is a final and appealable order, and in *Burdeau* v. *McDowell*, 256 U. S. 465, 41 Sup. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159, *an appeal from such an order was permitted on behalf of the government.* If there is an inconsistency in permitting a final and appealable order to be later re-examined collaterally and disregarded, it seems to have passed unnoticed."

Although not in so many words the Court plainly shows that it regards the *Perlman* and *Burdeau* cases as holding that orders on such applications, if made in advance of *trial*, not of indictment, and not involving the District Court's own writ (it was a *state* court search warrant) are final and appealable.

Again in the *Dowling* case, *supra*, the Sixth Circuit Court of Appeals showed the same opinion.

In the District Court for the Eastern District of Kentucky, a defendant in a criminal case, *indictment pending*, moved separately for the return of property seized under a search warrant and the suppression of its use as evidence. The two motions were joined, and an order denying both motions on the merits was entered. The defendant was subsequently tried, but the outcome of the trial does not appear.

Thereafter defendant applied to the court for the return of this property. The District Court denied the application on the ground that the prior order, being final and appealable was *res adjudicata*.

This view was sustained by the Sixth Circuit Court of Appeals. It said:

> "The reasoning of the opinion in *Perlman* v. *United States*, 247 U. S. 7, as well as in *Burdeau* v. *McDowell*, 256 U. S. 465, fully supports the conclusion that *the orders on the preliminary motions*

and petitions in the criminal case were final and as such reviewable in this court; though entitled in that case they were no essential part of the trial therein; as preliminary matters they were as independent therefrom as were the petitions in the Perlman and Bardeau cases."

Concededly at the time the preliminary application was denied an indictment against the applicant was pending.

The Court below has distinguished the *Dowling* case on the ground that the order was final because the vacating of a search warrant was involved. Yet the Sixth Circuit Court of Appeals relied *solely* on decisions of this Court *not involving search warrants or other writs* in holding the order final.

The Court below also distinguishes *Dowling* v. *Collins* by saying that the property there involved had a value other than evidentiary. The property was contraband liquor which certainly has no marketable value. Books and papers of account have no marketable value, but they are extremely valuable to their owners. Where is the line to be drawn? The suggestion of the Court below is a novel one and finds no support in any authority counsel could discover, and certainly finds none in the cases here discussed.

f. *Steele* v. *United States* was misunderstood by the Court below, as its opinion shows.

In the *Steele* case the applicant's property had been seized under a search warrant issued by a commissioner. After the seizure the warrant was traversed by Steele, but the commissioner sustained the warrant. Steele was

later indicted, and then he applied to the District Court for an order vacating the search warrant and returning the property seized thereunder. This application was denied by a judge of the District Court who was *not* the judicial officer who had issued the warrant. Steele appealed from the order denying the application, and this Court reviewed the matter on the merits.

Now the opinion of the Court below shows that it misunderstood the *Steele* case. It said:

> "Under Section 16 of the Search Warrant Act upon the return of the executing officer the judge or commissioner allowing the writ is to restore property unlawfully seized. Such an order was treated *sub silentio* as a 'final decision' in *Steele* v. *United States* * * *."

But the order appealed from was *not* the order of the judge or commissioner who had allowed the writ. A commissioner had allowed the writ but the order appealed from was made by a judge in a proceeding brought in the District Court, and in the criminal case.*

Thus in the *Steele* case an order refusing to return seized property, the order having been made in a special proceeding in the criminal case, indictment pending, was reviewed on appeal—and the case is misunderstood by the Court below, which thinks that the order ap-

* The docket of the District Court in the *Steele* case shows the following entries:

October 20, 1923—Information Filed (Possession of Intoxicating liquor)
October 22, 1923—Defendant Pleads Not Guilty
October 31, 1923—Motion to set aside and Vacate Search Warrant and for the return of Property Returnable Nov. 5th, 1923
November 7, 1923—Motion Denied—Winslow, J.
March 12, 1924—Trial—Verdict Guilty—Fine $500.00

pealed from was the order of the judge who allowed the writ, and made by that judge in the course of proceeding provided for in the Espionage Act and described on page 501 of 267 U. S.*

g. *Essgee Company* v. *United States* has been similarly misunderstood.

In the *Essgee Company* case a subpoena *duces tecum* had been served on an officer (one Schratter) of a corporation, commanding him to produce certain corporate papers at the U. S. Courthouse. This he did, and left them on a table where the United States Attorney found them and took them. The papers were brought before the Grand Jury and Schratter was subsequently indicted. Indictment pending Schratter applied for a return of the papers. The decision on the application seems to have involved the propriety of the subpoena, but the application was certainly not directed at the subpoena nor did it involve vacating, quashing or otherwise disposing of the subpoena. It was purely and simply an effort to get back papers which the United States Attorney had for the purpose of prosecuting the applicant.

The Court below has said:

> "The case is in any event to be distinguished in that the motion was for the determination of a proceeding commenced by the court's writ."

The determination was *not* of a proceeding commenced by the court's writ.

*These facts are not entirely clear from the opinion of the court, but counsel has examined the record and can assure this court that the facts here stated are correct.

The proceeding had been commenced by the appellant's application for the return of papers which the United States Attorney had; he happened to have them because of a subpoena served months before.

The Court's implication is that the proceeding was one to vacate a court's writ, but, of course, that is not the case.

h. The *Segurola* case shows that this Court attaches no importance to the pendency of an indictment or connection with a court writ.

In *Segurola v. United States*, *supra*, this Court showed that it did not consider applications for the return of seized property as any more an integral part of a main criminal case when no search warrant, subpoena or other writ was involved. In that case Segurola had been searched without a warrant and property in his possession seized. Without previous application he objected to his introduction at the trial.

This Court said:

> "The Court will not in trying a criminal case permit a *collateral* issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which happened to cross the path of such litigation and *which is wholly independent of it.*"

i. Summary.

In an involved suit it is not unusual that a controversy arises between some or all of the parties on a matter separate from the issues raised by the pleading. In equity receiverships, for instance, such separate controversies are constant—this or that property is sold, allowances are made, and so on. The final determination of the court of first instance in these incidental matters is appealable.

Under the doctrine of this Court in that well known series of cases, *Boyd* v. *United States*, 116 U. S. 616, *Weeks* v. *United States*, 232 U. S. 383, *Gouled* v. *United States*, 255 U. S. 298 and others, applications for the return of property possessed by prosecuting officers, have become well-defined proceedings of frequent occurrence in the District Courts. Sometimes these applications are made before indictment, sometimes after. Sometimes the applicant is the only person proceeded against, or to be proceeded against (*Perlman* case); sometimes, as here, only one of the defendants is interested in the application. Sometimes the property in question has been obtained under a search warrant; sometimes because a party has been coerced by subpoena; sometimes it has merely been seized, as here, and as in the *Segurola* case.

In the *Essgee Company* case these proceedings were briefly described as follows:

> "The review sought is of an order of the District Court in which no jury can intervene. It likens itself in its appellate character to a review of cases in equity or admiralty in which issues of fact are triable to the court, and in which the review may properly involve a re-examination by the reviewing

court of the whole record of the court upon both the law and the evidence therein."

These proceedings determine who, as between the prosecuting officer and the applicant, is entitled to the property, the subject matter of the application. It is quite apart from the general issue—which here is whether or not petitioner and others were conspirators against the laws of the United States.

The opinion of the Court below shows it has confused these principles. A controversy does not become the less a special proceeding because some more important issue is pending between the parties, nor does the incidental fact that the merit of some court writ is questioned introduce some strange magic which gives the order determining the controversy an appealable character.

The theory urged by counsel harmonizes the decisions of the Court and has been adopted by the Circuit Court of Appeals of the Sixth Circuit.

POINT II.

The decision in this case is highly important.

a. A conflict exists between the Second and Sixth Circuits.

Whatever may be said as to factual distinctions between this case and *Dowling* v. *Collins*, it is clear from the opinion in that case that the Circuit Court of Appeals of the Sixth Circuit regards orders on applications for the return of property seized as final and appealable.

We quote again from the *Dowling* case:

> "The reasoning of the opinion in *Perlman* v. *United States*, 247 U. S. 7, as well as in *Burdeau* v. *McDowell*, 256 U. S. 465, fully supports the conclusion that the orders on the preliminary motions and petitions in the criminal case were final and as such reviewable in this court; though entitled in that criminal case, they were no essential part of the trial therein; as preliminary matters they were as independent therefrom as were the petitions in the *Perlman* and *Burdeau* cases."

In the *Dowling* case an indictment was pending at the time the application was made. By citing decisions of this Court in cases in which no indictment was pending at the time of the order, the Court shows that it does not think the pendency of an indictment changes the final character of the order. Although a writ was involved in the *Dowling* case, no writ was involved in the authorities cited, so that the Sixth Circuit Court of Appeals does not think that a material feature.

b. The case is extremely important to the Government.

Although presumably a defendant could eventually obtain review on the merits in an Appellate Court, the same can not be said of the Government.

If an application like the present is granted, in very many cases it will mean that the evidence is insufficient to obtain a conviction and the prosecution will fail, unless the order is reversed.

But if appeal does not lie, the order can not be reversed and the prosecution will fail without the Government's having had an opportunity for review.

Take *Burdeau* v. *McDowell*. Suppose there the application had not been made until after indictment. In that case the District Judge granted the application. The Government would never have been able to obtain review and the prosecution would have failed, and wrongfully, because the District Court's order was erroneous.

These applications are numerous; and the law of search not yet entirely settled as the frequent reversals in search cases show. The Government can not afford to lose its opportunity for review.

c. The present decision in connection with the rule recently insisted upon in *Segurola* v. *United States* will cause confusion.

In *Segurola* v. *United States*, it appeared that property of a defendant in a criminal case had been seized at the time of his arrest, unconstitutionally, he thought. There was no search warrant. At the time of the trial he objected to the seizure for the first time by opposing the introduction of this property in evidence, but it was admitted. This Court said:

> "* * * The court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which happened to cross the path of such litigation and which is wholly independent of it. In other words in order to raise the question of illegal seizure, and an absence of probable cause in that seizure, the defendants should have moved to have the liquor re-

turned to them as their property and as not subject to seizure or use as evidence."

Let us suppose the defendant does make such a motion and it is denied.

Then how is the defendant to obtain review?

He cannot raise the question at the trial so his bill of exceptions will not show his grievance.

Nor, if the decision of the Court below is right may he appeal direct.

d. The case is important to defendants.

Suppose the defendant is acquitted at the trial.

How is he to get his property back? He cannot appeal from the order denying his application; he cannot appeal from a judgment of acquittal.

Suppose the defendant is convicted. There is great uncertainty, as outlined above, as to how to protect his rights.

Moreover, it is extremely difficult, if not impossible, for the petitioner to protect the rights given him under the decision of this Court in *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, the doctrine of which case forbids prosecuting officers not only to introduce wrongfully seized property, but to use in a prosecution information which they may have derived from property wrongfully seized. How is the petitioner Cogen to know when testimony is produced at the trial whether or not the Government was able to obtain such testimony from information which it obtained by examining these papers? If the petitioner Cogen's rights are to be fully protected it will be necessary, continually, to inquire whether or not the testimony offered was so obtained, and, certainly, such in-

quiries would cause "halts in the orderly progress of a cause" more disturbing and more embarrassing than those which this Court said in the *Segurola* case must be avoided.

POINT III.

The writ of certiorari should issue.

Respectfully submitted,

SANFORD H. COHEN,
Attorney for Petitioner.

CHARLES DICKERMAN WILLIAMS,
Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 833

J. ROBERT COGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 19) and the opinion of the Circuit Court of Appeals (R. 31) are unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 29, 1928. (R. 39). The petition for certiorari was filed March 9, 1928. Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The single question in this case is whether an order of the District Court denying a motion for the return of seized papers and for the suppression of all evidence obtained therefrom, which motion was made subsequent to the indictment of the movant and entitled as in the criminal case, was a final order reviewable by the Circuit Court of Appeals.

STATEMENT

Following his indictment in the District Court of the United States for the Southern District of New York upon a charge of conspiracy to violate the National Prohibition Act, petitioner moved in that court for the return to him of certain papers and for the suppression of all evidence obtained therefrom. The motion was entitled as in the criminal case. As grounds therefor petitioner asserted in an accompanying affidavit that said papers had been taken in a search of his person by a named prohibition agent immediately preceding his arrest by that officer, who had neither a search warrant nor a warrant of arrest and who did not have probable cause for belief that petitioner was committing an offense in his presence. (R. 3–8.)

In opposition to the motion the Government filed two affidavits. The first, made by the prohibition agent who had searched the petitioner, stated facts and circumstances tending to show probable cause

for belief on the part of said officer that at the time of petitioner's arrest he was engaged in carrying out a conspiracy to violate the National Prohibition Act, and further declared that the affiant had searched the petitioner "after telling him that he was under arrest." (R. 9–13.) The second affidavit, sworn to by an Assistant United States Attorney, stated facts in corroboration of the first as to the existence of probable cause. (R. 14–15.) Petitioner filed a reply affidavit in which previous sworn statements by said prohibition agent were quoted as indicating that he did not have probable cause for arresting petitioner. (R. 16–19.)

Upon the evidence furnished by the foregoing affidavits the court found that the arrest had preceded the search and was upon probable cause. It accordingly denied the motion. (R. 19–20.) To review that order petitioner sued out a writ of error from the Circuit Court of Appeals, which dismissed the writ for want of jurisdiction on the ground that the order appealed from was an interlocutory order in the criminal case and therefore not appealable. (R. 31–34, 39.) Certiorari is asked on the ground that the Circuit Court of Appeals erred in holding that the order in question was not a final order subject to review in that court.

ARGUMENT

I

THE ORDER APPEALED FROM WAS INTERLOCUTORY

Petitioner's application for the return of the seized papers and for the suppression of all evidence obtained therefrom was entitled as in the criminal case then pending against him. The "Notice of Motion," addressed to the United States Attorney, informed that "the undersigned will move this Court on the 7th day of November, 1927," for an order granting the relief prayed. (R. 3.) The application constituted, therefore, a motion in the criminal case. Petitioner does not dispute this, but, on the contrary, states his position as follows (Pet. 7):

> An application for the return of property in the possession of prosecuting officers is a special proceeding, and if indictment is pending a special proceeding in the criminal case, and the order on the application finally determines the rights of the parties in the subject matter.

It is settled, however, that where an application for the return of seized property and for its suppression as evidence is in substance and effect a proceeding in a pending case, as distinguished from a proceeding begun by an independent petition, the order granting or denying the relief prayed is but

interlocutory in the pending case and therefore not appealable.

> *Coastwise Lumber & Supply Co.* v. *United States* (C. C. A., 2d), 259 Fed. 847, 849.
>
> *United States* v. *Maresca* (S. D., N. Y.), 266 Fed. 713, 719.
>
> *United States* v. *Marquette* (C. C. A., 9th), 270 Fed. 214, 215.
>
> *Petition of Barber* (E. D. Mich.), 281 Fed. 550, 553.
>
> *Voorhies* v. *United States* (C. C. A., 5th), 299 Fed. 275, 276.
>
> *United States* v. *Broude* (Minn.), 299 Fed. 332, 336–338.
>
> *Jacobs* v. *United States* (C. C. A., 9th), 8 F. (2d) 981, 982–983.

A similar view was expressed by this Court in *Wise* v. *Mills*, 220 U. S. 549. The record in that case shows that subsequent to the indictment of Mills in the Circuit Court of the United States for the Southern District of New York, he filed in that court a petition, entitled as in the criminal case, praying the return to him of books and papers which had been seized upon his premises by the United States Marshal immediately following the execution by that officer of a warrant for his arrest. The Circuit Court found that the documents in question had been taken in violation of the petitioner's rights under the Fourth Amendment and issued an order directing the United States Attorney, to whom they had been delivered by the Marshal, to return them to the petitioner. The

United States Attorney refused to obey this order and, being adjudged in contempt of court, sued out a direct writ of error from this Court. In the course of an opinion dismissing the writ for want of jurisdiction the Court said (p. 554):

> The only ground stated in the assignments of error which in the remotest degree refers to a matter which would come within our right to review is the third assignment, which asserts: "The court erred in adjudging that the taking into custody of said books and papers at the time of the lawful arrest of said Lawrence H. Mills, Charles G. Mourraille and Emil S. Dutlot was in violation of the provisions of the Constitution of the United States." * * * But it is obvious on the face of the record that the error thus assigned and the discussion at bar in regard to it concern themselves, not with the order which it is sought to review, that is, the commitment for contempt, *but to another and different order not final in its character, that is, the order of the court directing the return of the books and papers. Alexander v. United States*, 201 U. S. 117. (Italics ours.)

And on page 555 the Court points out the misconception of the plaintiff in error in assuming "that the right to have a direct review of the final contempt order carries with it the right to have at the same time a review of *the interlocutory order returning the books.*" (Italics ours.)

The decisions of this Court in *Perlman* v. *United States*, 247 U. S. 7; *Burdeau* v. *McDowell*, 256 U. S. 465; *Essgee Co.* v. *United States*, 262 U. S. 151, and *Steele* v. *United States No. 1*, 267 U. S. 498, upon which petitioner here relies, are readily distinguishable from the instant case. In the *Perlman case* a prior patent suit in which Perlman had appeared as a witness and in which articles belonging to him had been received as exhibits, was dismissed without prejudice, but the exhibits were impounded by order of the court. The United States Attorney thereafter instituted proceedings before a grand jury for an indictment of Perlman for perjury committed while testifying in the patent case, and applied to the court for an order directing the clerk to produce the aforesaid exhibits before the grand jury. A countervailing petition by Perlman, that the use of said exhibits as evidence by the United States Attorney be enjoined, was denied; the application of the United States Attorney was granted, and Perlman appealed directly to this Court. The Government moved to dismiss the appeal on the ground, among others, that "The order of the District Court if considered as a part of the criminal proceeding is not final, but merely interlocutory, and therefore not reviewable by this court." In denying the motion this Court said (p. 12):

> The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as

> to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

In referring to the criminal action as not yet brought notwithstanding the proceedings before the grand jury, the Court undoubtedly had in mind the rule announced in *Post* v. *United States*, 161 U. S. 583, 587, as follows:

> Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. *Virginia* v. *Paul*, 148 U. S. 107, 119, 121; *Rex* v. *Phillips*, Russ. & Ry. 369; *Regina* v. *Parker*, Leigh & Cave, 459; *S. C.* 9 Cox Crim. Cas. 475. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced; the grand jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court.

As, therefore, when the order reviewed in the *Perlman case* was made the proposed criminal action had not been brought and the civil action had been dismissed, the only proceedings pending were those involving the use of the exhibits as evidence, and as those proceedings were fully terminated by the order it was necessarily a final order subject to review.

In the *McDowell case* the petition prayed the return to McDowell of papers which had been stolen from him and turned over to Burdeau, a Special Assistant to the Attorney General, who proposed to use them as evidence before a grand jury to secure an indictment of McDowell for fraudulent use of the mails. The District Court granted the petition and Burdeau sought review of that order upon a direct appeal to this Court. As no criminal case against McDowell was pending and the order appealed from completely disposed of the proceedings in which it was rendered, it was obviously a final order for appellate purposes.

In *Essgee Co.* v. *United States* the petitions for the return of books and papers were filed after indictments had been returned against petitioners. The petitions were not entitled as in the criminal cases, however, but were plainly intended by the petitioners and treated by the court as the beginning of new and independent proceedings. The orders denying the petitions were, therefore, obviously final and reviewable in this Court.

In the *Steele case* prohibition agents executing a warrant to search Steele's premises found and seized intoxicating liquor. Steele thereupon appeared in the commissioner's court and moved that the warrant be quashed and the liquor returned on the ground that the warrant had issued without probable cause. The commissioner overruled the motion and Steele filed an application in the District Court for a review of the proceedings before the commissioner and for an order quashing the warrant and directing a return of the seized property. The District Court denied the application and its order was affirmed by this Court upon a direct appeal. No reference to any pending criminal case was made in the title of the petition, in the petition itself, or anywhere else in the record of the proceedings in the District Court. Whether Steele's application was made subsequent to the filing of a criminal information against him, as petitioner here attempts to show (Pet. 15, footnote), is immaterial, for the proceedings begun by that application were plainly independent of the criminal case which came to this Court upon a separate record and was disposed of as a separate case. *Steele* v. *United States No. 2*, 267 U. S. 505.

It is apparent, therefore, that none of the foregoing decisions of this Court cited by petitioner is authority for his contention that an order denying a motion in a criminal case for the return of seized property and for the suppression of its use as evi-

dence is a final order subject to review. Furthermore, no question of the jurisdiction of this Court to entertain the appeals in those cases was raised or decided, and this Court has repeatedly held that the fact that it entertained jurisdiction in a given case, no question of jurisdiction having been raised, affords no basis for holding such case authoritative as to jurisdiction in subsequent cases of like character. *Arant* v. *Lane*, 245 U. S. 166, 170; *Fritch* v. *United States*, 248 U. S. 458, 463; *Baldwin Co.* v. *Howard Co.*, 256 U. S. 35, 40.

If petitioner were correct in his assertion that the order of the District Court in the instant case finally disposed of special proceedings which were separate and distinct from the criminal case in which the motion overruled by said order was made, it would follow that all questions involving the validity of the seizure would be *res judicata* and could not again be passed upon by the court in considering objections to evidence at the trial.

In *Steele* v. *United States No. 2, supra*, it was held that the questions presented by assignments of error to the overruling of objections to evidence, whether the prohibition agent who executed the search warrant was authorized to do so, and whether there was probable cause for the issuance of such warrant, were *res judicata* because those questions had either been determined, or could have been raised and determined, in the separate proceedings begun by Steele's petition for the return of

property and suppression of evidence. On the other hand, in *Gouled* v. *United States*, 255 U. S. 298, where the petition for the return of property was filed in the criminal case, the question certified to this Court, whether the District Court was required after having denied such petition to rule upon the same points again when raised in the form of objections to evidence, was answered in the affirmative, the Court saying (p. 313):

> In the case we are considering the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant.

So, also, in *Byars* v. *United States*, 273 U. S. 28, 29, and *Marron* v. *United States*, decided November 21, 1927, in each of which a petition for return of seized property, etc., was filed in the criminal case, this Court specifically referred to the fact that such prior petitions had been made and denied before ob-

jections upon the same grounds to evidence at the trial were overruled by the District Court.

These references to decisions of this Court show clearly the Court's view that where independent proceedings are brought to obtain the return of seized property and the suppression of evidence concerning it, the order of the court granting or denying the relief prayed is a final decision; but that where, as in the present instance, such relief is sought by a motion in a pending criminal case the order upon the motion is but interlocutory.

Petitioner cites *Trustees* v. *Greenough*, 105 U. S. 527; *United States* v. *River Rouge Co.*, 269 U. S. 411, and other cases, as instances in which orders rendered in pending cases were held subject to review. In those cases, however, the particular matter decided was plainly severable from the other issues in litigation, whereas in the instant case the motion denied by the District Court would, if granted, prevent the use of evidence without which it would be useless to proceed.

II

ALLEGED CONFLICT OF DECISIONS

Petitioner asserts a conflict between the decisions of the court below and that of the Circuit Court of Appeals for the Sixth Circuit in *Dowling* v. *Collins*, 10 F. (2d) 62. It is submitted that no such conflict exists. The grounds upon which the appeal in the

instant case was dismissed by the court below are thus stated by it in concluding its opinion (R. 34):

> A motion to suppress and surrender the evidence, made after indictment in such a case, appears to us no more than a step in preparation for the trial and the order as interlocutory.

In the *Dowling case* an original suit was brought to quash search warrants, to secure a return of the property seized thereunder, and to suppress the use of such property as evidence. As appears from the record in that case, the petitioner had previously moved for a return of the same property and for a suppression of evidence relating thereto prior to her trial in a criminal case. The motion was overruled and the evidence admitted at the trial over her objection. The jury failed to agree, however, and the case was set for retrial. Prior to the retrial the petitioner moved to quash the search warrant and to order the seized property returned. That motion was denied, but no trial was had as the jury was discharged because of petitioner's illness, which would prevent her being present. In this situation the original suit was brought. After a trial at which all the evidence in the previous criminal case was introduced, the District Court "overruled and dismissed" the petition on the grounds: (1) That petitioner having elected to test the validity of the seizure by motion in the criminal case, instead of by an independent proceeding, was estopped to bring the original suit; (2) that the

questions presented by the original petition were *res judicata* because of the orders on the motions in the criminal case; (3) that the search warrants were valid, and (4) that irrespective of the warrants the search and seizure was not unreasonable. In affirming the judgment, the Circuit Court of Appeals sustained the rulings of the District Court as to the estoppel and *res judicata*. It also declared that it fully concurred in the finding of the trial judge "that, irrespective of the validity of the search warrants, the search and seizure under the circumstances was not unreasonable."

It is true that in discussing the question of *res judicata* the Circuit Court of Appeals in the *Dowling case* treated the motions in the criminal case as independent proceedings and the orders denying them as final, and that to this extent its opinion is inconsistent with that of the court below in the instant case. The decision in the *Dowling case* was, however, fully supported by the court's conclusions as to the estoppel and as to the reasonableness of the search, questions which were in no way involved in the present case, and it is submitted that a conflict of decisions does not result merely because one of several grounds upon which a Circuit Court of Appeals has based its judgment is at variance with the ground upon which the judgment of another Circuit Court of Appeals has been rendered.

CONCLUSION

It is respectfully submitted that the petition should be denied.

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MARCH, 1928.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 89

J. ROBERT COGEN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court (R. 11) is unreported. The opinion of the Circuit Court of Appeals (R. 15) is reported in 24 F. (2d) 308.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 29, 1928. (R. 19.) The petition for certiorari was filed March 9, 1928, and was granted April 23, 1928. (R. 20.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The single question in this case is whether an order of the District Court denying a motion for the return of seized papers and for the suppression of all evidence that might have been obtained therefrom, which motion was made in a pending criminal case before trial, was a final decision reviewable by the Circuit Court of Appeals.

STATEMENT

Following his indictment in the District Court of the United States for the Southern District of New York upon a charge of conspiracy to violate the National Prohibition Act, petitioner moved in that court for an order directing the United States Attorney to return to petitioner certain papers seized from his person and for the suppression of all evidence obtained therefrom. (R. 2.) The motion was entitled as in the criminal case. (R. 1.) As grounds therefor petitioner asserted in an accompanying affidavit that the papers in question had been taken in a search of his person by Prohibition Agent James J. Donovan immediately preceding petitioner's arrest by that officer, who had neither a search warrant nor a warrant of arrest and who did not have probable cause for belief that petitioner was committing an offense in his presence. (R. 2-4.)

In opposition to the motion the Government filed two affidavits. The first, made by Agent Donovan,

stated facts and circumstances tending to show probable cause for belief on the part of that officer that at the time of petitioner's arrest he was engaged in carrying out a conspiracy to violate the National Prohibition Act, and further declared that the affiant had searched the petitioner "after telling him that he was under arrest." (R. 5–7.) The second affidavit, sworn to by an Assistant United States Attorney, stated facts in corroboration of the first as to the existence of probable cause. (R. 7–8.) Petitioner filed a reply affidavit in which previous sworn statements by Agent Donovan were quoted as indicating that he did not have probable cause for arresting petitioner. (R. 8–10.)

Upon the evidence furnished by the foregoing affidavits the court found that the arrest had preceded the search and was upon probable cause. It accordingly denied the motion. (R. 11.) To review that order petitioner sued out a writ of error from the Circuit Court of Appeals, which dismissed the writ for want of jurisdiction on the ground that the order appealed from was an interlocutory order in the criminal case and was therefore not appealable. (R. 15–19.) This Court thereafter granted a writ of certiorari to review the judgment of the Circuit Court of Appeals. (R. 20.)

SUMMARY OF ARGUMENT

The order appealed from was interlocutory. It was rendered upon a motion concededly made in a

criminal case which is still pending. With certain exceptions immaterial here, Section 128 of the Judicial Code confers jurisdiction upon the Circuit Court of Appeals to review orders, judgments, and decrees of the District Courts only when they constitute "final decisions." This Court has repeatedly held that a decision is "final" for appellate purposes when it terminates the controversy between the parties and leaves nothing to be done except to enforce by execution what has been determined.

As apparent exceptions to the general rule, this Court has in certain cases recognized a right to appeal from orders rendered upon petitions or motions in pending cases. It has done so, however, upon the ground that the adjudication appealed from, although rendered prior to final judgment or decree in the main action, had fully disposed of matters which were separate and distinct from the general subject of the litigation. Petitioner's attempt to bring the instant case within the effect of these exceptional cases is futile. His motion asked, not only that the seized property be returned to him, but that the United States Attorney be enjoined from using it, or any information derived therefrom, as evidence in the criminal case "or to offer any testimony on any transaction mentioned in any of the seized papers." (R. 4.) Obviously, a motion in a criminal case praying that evidence in the hands of the prosecution be sup-

pressed in the trial of that case can not be regarded as so separate and distinct from the criminal case as to render the denial of the motion a final decision subject to review.

Except for the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Dowling* v. *Collins*, 10 F. (2d) 62, the lower Federal courts have consistently held against petitioner's contention upon the precise question here involved. The opinion in the *Dowling case* was based upon an erroneous conception of the rulings of this Court in *Perlman* v. *United States*, 247 U. S. 7, and *Burdeau* v. *McDowell*, 256 U. S. 465. The orders reviewed by this Court in the latter two cases disposed of petitions which were filed when there were no other pending proceedings, civil or criminal, to which the petitioners were parties. As the orders in those cases finally terminated the proceedings in which they were rendered they were essentially final and reviewable.

The remaining decisions of this Court relied upon by petitioner distinguished.

ARGUMENT

THE ORDER APPEALED FROM WAS INTERLOCUTORY

(a) The proceeding in which the order was rendered is inseparable from the criminal case which is still undetermined

Petitioner's application for the return of seized papers and for the suppression of all evidence ob-

tained therefrom was entitled as in the criminal case then pending against him. The "Notice of Motion," addressed to the United States Attorney, informed that "the undersigned will move this Court on the 7th day of November, 1927," for an order granting the relief prayed. (R. 2.) The application constituted, therefore, a motion in the criminal case. Petitioner does not dispute this, but, on the contrary, states his position as follows (Br. 6).

> The petitioner's contention is that such a motion is a special proceeding *and if indictment is pending it is a special proceeding in the criminal case*, and the order on the application finally determines the rights of the parties in the subject matter. (Italics ours.)

Unless the order denying the motion was a "final decision," the Circuit Court of Appeals had no jurisdiction to review it, Sec. 128, Judicial Code; *Ex parte Tiffany*, 252 U. S. 32, 36. What constitutes a final decision, judgment, or decree, for appellate purposes, has been many times announced by this Court. As stated by Chief Justice Waite in *St. Louis, Iron Mountain & Southern R. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, 28:

> • • • a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.

Likewise, in *McLish* v. *Roff*, 141 U. S. 661, 665, this Court declared:

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error, * * * have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

See also *Heike* v. *United States*, 217 U. S. 423, 429; *United States* v. *Beatty*, 232 U. S. 463, 466; *Collins* v. *Miller*, 252 U. S. 364, 370.

Notwithstanding the rule above stated, it has been held by this Court that an adjudication of a claim to property presented by an intervening petition in receivership proceedings was final without awaiting the termination of the principal litigation, *Trustees* v. *Greenough*, 105 U. S. 527, 531; *Williams* v. *Morgan*, 111 U. S. 684, 699; *Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207, 225; that a judgment finding the defendants in an equity suit guilty of contempt in violating an interlocutory injunction was reviewable as a final determination of a criminal proceeding against the contemnors, *Matter of Christensen Engineering Co.*, 194 U. S. 458, 461, and that an order of a Federal District Court denying the application of the receiver of an insolvent corporation appointed by a State court for an order turning over

to him assets of the corporation in the hands of a receiver previously appointed by the Federal court, was a final and reviewable decision, *Ex parte Tiffany*, 252 U. S. 32, 36. The decisions in these and other similar cases are, however, only apparent exceptions to the general rule, for in each instance this Court made plain that the ground upon which it held that an appeal lay was that the adjudication appealed from, although rendered prior to final judgment or decree in the main action, had finally disposed of matters which were separate and distinct from the general subject of the litigation.

Recognizing the force of the general rule, petitioner seeks to bring the instant case within the effect of the foregoing exceptional cases by asserting that the proceeding begun by his motion in the criminal case was a "special proceeding" independent of that case, and that the order denying the motion and terminating the proceeding was therefore a final decision subject to review. He argues (Br. 10) that the controversy as a whole is between the United States, on the one hand, and Cogen and his codefendants, on the other, the issue for determination being whether the defendants are guilty of the crime of conspiracy, whereas the matter for determination upon the motion to return seized property and suppress evidence is whether the United States Attorney or Cogen is rightfully entitled to said property. It is submitted that this is not a correct statement of the matters involved.

It is true that the ultimate issue for determination in the criminal case is the guilt of the defendants, but long before that issue is ripe for submission to the jury many minor issues are likely to arise for decision, among them (unless this Court should reverse the judgment of the Circuit Court of Appeals dismissing petitioner's appeal and the latter court should reverse the order of the District Court denying his motion), whether the property seized from petitioner's person, or information gained therefrom, may lawfully be introduced in evidence against him at the trial. Furthermore, the manifest object of petitioner's motion was to prevent the use of such evidence at the trial. Not only did he ask in his motion for the suppression of all evidence obtained from the seized papers (R. 2), but in the affidavit which accompanied the motion he stated (R. 4):

> I am further informed and believe that some or all of these papers, or copies thereof, have been turned over by the said Prohibition Agent, James J. Donovan, to the United States Attorney, or his Assistants, and that these papers, memoranda, books, documents, etc., are intended to be used by the United States Attorney, or his Assistants, upon the trial of the Indictment now pending against me and of using the information obtained therefrom at the said trial.
>
> * * * * *
>
> That this affidavit is made for the purpose of the issuance of an order for the return

> of all the books, papers, memoranda, etc., seized, as aforesaid, together with all copies thereof, and for a further order to the United States Attorney directing him, or his assistants, not to offer the same in evidence or to offer any testimony on any transaction mentioned in any of the seized papers upon the trial. * * *.

A motion thus made in a criminal case, asking that the use at the trial of evidence in the possession of the prosecuting officers be suppressed, does not constitute a proceeding so separate and distinct from the criminal case that an order denying the motion is a final and reviewable decision.

(*b*) *With but one exception the courts dealing with the precise question here involved have consistently ruled against petitioner's contention*

The great weight of authority is against the right to appeal from an order such as that rendered by the District Court in this case. In *Coastwise Lumber & Supply Co.* v. *United States* (C. C. A., 2d), 259 Fed. 847, books and papers of the Coastwise Company were seized upon search warrants and impounded by order of the District Court for use in the trial of indictments pending against the company and certain individual defendants. The court thereafter entered an order denying an application by the company for the return of the seized property, and the company sued out a writ of error from the Circuit Court of Appeals to review that order. In an opinion dismissing the writ

for want of jurisdiction, the Circuit Court of Appeals said (p. 848–849):

> The government at the outset makes the objection that the order is interlocutory, and therefore not appealable, because our appellate jurisdiction is restricted to final decisions of the District Courts, with exceptions not material here. Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133, Sec. 128).
>
> It seems to us quite manifest that the search warrants were issued in the criminal action. They describe the property authorized to be seized as being used to commit a felony, viz. a conspiracy to defraud the United States in violation of section 37 of the Penal Code. The individual defendants had been already arrested on this charge, and all the defendants were under indictment before the Coastwise Company made its demand for a hearing before the United States commissioners under Sections 15 and 16 of title 11 of the act of June 15, 1917, and of course before this petition was filed in the District Court.
>
> It may be suggested that the petition was an independent proceeding because the notice of motion and the affidavit in support of it were entitled "In re Books and Papers of the Coastwise Lumber & Supply Company, a Corporation," and the subsequent proceedings were entitled in a similar way. We regard the form of title used as of little importance. The material consideration is whether the demand was made in the criminal action

> or as an independent special proceeding. A defendant can not make an interlocutory order final by the choice of any particular form of title. All the earlier proceedings were entitled in the criminal action "United States of America against Coastwise Lumber & Supply Company, Inc.," and the other defendants. The particular order sought to be reviewed describes the books and papers as impounded "to aid the government in the prosecution of indictments against the said corporation and other defendants mentioned in said indictments," and in his opinion the District Judge describes the Coastwise Company, the petitioner, as the defendant, saying: "* * * Inasmuch as it appears that all of the papers are absolutely necessary to the government's case against the defendant, I am not disposed to interfere with the impounding order."

In *United States* v. *Marcus* (S. D. N. Y.), 266 Fed. 713, Circuit Judge Hough, sitting as a District Court, denied a motion made in a criminal case for the return of seized property. Speaking of the effect of that decision in a memorandum opinion, he said (p. 719):

> Using the word "effect" as meaning lasting or permanent influence, this decision has no effect of importance. It permits the United States attorney to keep the book, and is not reviewable (*Coastwise, etc., Co.* v. *United States*, 259 Fed. 847); but the reason why an application of this kind by a party

> can not be reviewed is that the order on this decision is interlocutory * * *.
>
> Whether the decision and its distinction is right or not, it is the ruling in this circuit; wherefore, if and when this book is offered in evidence, it seems that the defendant affected can either rest on the error he will believe to exist in this "interlocutory" ruling of mine or renew his argument by appropriate objection to admission in evidence, or do both. At all events, nothing is or can be settled either by this decision or any immediate review of it.

In *United States* v. *Marquette* (C. C. A., 9th), 270 Fed. 214, the Government appealed from an order of the District Court directing the return of seized liquors upon a petition filed in a criminal case. The appeal was dismissed by the Circuit Court of Appeals for want of jurisdiction, the court saying (pp. 214–215):

> The appellees have moved to dismiss the appeal, on the ground that the order is not final, and therefore no appeal will lie. This motion must be granted. It is well settled that interlocutory orders such as this are not appealable. *Coastwise Lumber & Supply Co.* v. *U. S.*, 259 Fed. 847; *U. S.* v. *Marasca* (D. C.) 266 Fed. 713; *Crooker* v. *Knudsen*, 232 Fed. 857.
>
> The argument on the part of the government that a plenary suit in replevin or claim and delivery might have been instituted for the recovery of the property, and that

> an appeal or writ of error would lie from the final judgment is beside the question. The court below did not assume jurisdiction for the purpose of trying title or right of possession, but merely to prevent the use of the property wrongfully seized as evidence upon the trial of the criminal charge, and the order directing a return of the property to avoid that result is no more final or appealable than would be any other order excluding testimony on the trial.

In *Voorhies* v. *United States* (C. C. A., 5th), 299 Fed. 275, the Circuit Court of Appeals, denying a motion by the Government to dismiss, retained a writ of error to review an order of a District Court denying a petition for the return of seized liquor. It did so, however, on the ground that the petition was not filed in any pending case. It said (p. 276):

> The government moves to dismiss the writ of error on the ground that the judgment of the District Court is not final. So far as the record before us discloses, this is an independent action, and is not incidental to a criminal prosecution or other original proceeding. The motion to dismiss is therefore denied.

That an independent proceeding may be brought for the return of property alleged to have been illegally seized was held in *Petition of Barber* (E. D. Mich.), 281 Fed. 550. Overruling an objection by the Government that the court had no jurisdic-

tion to entertain the petition filed in that case, District Judge Tuttle said (pp. 552–553):

> A preliminary objection by the government to the jurisdiction of this court to proceed in this cause must be first considered. It is contended by the government that this petition should not have been filed as the commencement of a new cause, but should have been presented in the proceeding in which the search warrant itself was issued. Section 25 of the National Prohibition Act (41 Stat. 315) provides that property seized under the search warrant therein authorized "shall be subject to such disposition as the court may make thereof." I discover no reason, based either on authority or on principle, and none has been brought to my attention, why this court may not or should not entertain and pass on a petition such as that here under consideration, filed in an independent cause for the purpose of seeking a return of property alleged to have been taken on an illegal search warrant. The objection by the government to the contrary must be overruled.

Veeder v. *United States* (C. C. A., 7th), 252 Fed. 414, was a proceeding by the United States for the issuance of a warrant to search for and seize certain books and papers in the possession of Veeder. The warrant issued and Veeder sued out a writ of error from the Circuit Court of Appeals, where the action of the District Court was reversed with direction to quash the search warrant. No question

of the jurisdiction of the Circuit Court of Appeals appears to have been raised in or decided by that court. As, however, the application for search warrant was not a proceeding in any pending case, the order of the District Court directing the warrant to issue was obviously a final, as distinguished from an interlocutory, decision.

In *United States* v. *Broude* (Minn.), 299 Fed. 332, District Judge McGee, having denied a motion made in a pending criminal case for the return of seized liquors, refused to allow a writ of error to review that decision on the ground that it was interlocutory only. His reasons may not have justified the refusal to allow the writ of error, but they show that if the writ had been allowed the Circuit Court of Appeals must have held the order not reviewable. Distinguishing the case before him from the decision of this Court in *Perlman* v. *United States*, 247 U. S. 7, as well as from the *Veeder case*, *supra*, he said (p. 337):

> In both the Perlman and the Veeder Cases, on a bare statement of the facts, it is apparent that they were independent special proceedings, and that the decision in each was a final decision to which a writ of error would lie. In the instant case no attack was made upon the search warrant, nor upon any proceeding had under it, until four days after the informations were filed against the defendants, and after they

had been arraigned and pleaded not guilty to the same. * * *

* * * * *

Considering the policy of Congress, as evidenced by all legislation on the subject from 1789, at least, to restrict appeals and writs of error to judgments, decrees, and decisions that are final, it can not be held a permissible construction of section 6 of the Act of March 3, 1891, to hold that an order of a District Court denying a motion to quash a search warrant, or an order refusing to direct the return of property seized under it, which leaves the action in which the order was made pending and undetermined, is a final decision to which a writ of error will lie. I am of the opinion that such a construction placed upon section 6 would be a perversion of the meaning of that section and not consistent with the policy of the law embodied in it.

The precise question under consideration has been directly passed upon and decided adversely to the petitioners herein in the Circuit Courts of Appeal of the Second and Ninth Circuits and by the Court of Appeals of the District of Columbia. *United States* v. *Maresca* (D. C. S. D. N. Y.) 266 Fed. 713; *United States* v. *Marquette* (C. C. A. 9) 270 Fed. 214, 215; *Coastwise Lumber Co.* v. *United States* (C. C. A. 2) 259 Fed. 847, 849; *United States* v. *Mattingly*, 285 Fed. 921, 923, 924. No case has been called to my attention, nor have I been able to find one,

> in which the precise question under consideration was involved, in which a conclusion was reached at variance with the views expressed in the cases last cited.

In *Jacobs* v. *United States* (C. C. A., 9th), 8 F. (2d) 981, the defendants, prior to trial upon an information charging violation of the National Prohibition Act, filed a petition in the criminal case praying that a search warrant be quashed; that the property seized under the warrant be suppressed as evidence, and that the information be dismissed. From an order denying the petition, they sued out a writ of error from the Circuit Court of Appeals, which, upon motion of the Government, dismissed the writ as addressed to an order of the District Court which was but interlocutory and therefore not appealable. In the course of an opinion in which most of the cases heretofore referred to in this brief were approvingly cited, the Circuit Court of Appeals said (p. 982):

> The matter is clarified by observing that, where a stranger to the suit or to the intended suit petitions for the return of property and his petition is denied, the order is final as to him, for unless he can sue out a writ of error he would be remediless. But where one is a party to a criminal action pending, and petitions for the return of property that has been seized under a warrant, and which is to be used in evidence upon the trial of the criminal action, the ruling

> upon his petition is upon an intervening matter, and is not a final decision.

A view similar to that announced by the lower Federal courts in the foregoing cases was expressed by this Court in *Wise* v. *Mills*, 220 U. S. 549. The record in that case shows that subsequent to his indictment in the Circuit Court of the United States for the Southern District of New York, Mills filed in that court a petition, entitled as in the criminal case, praying the return to him of books and papers which had been seized upon his premises by the United States Marshal immediately following the execution by that officer of a warrant for his arrest. The Circuit Court found that the documents in question had been taken in violation of the petitioner's rights under the Fourth Amendment and issued an order directing the United States Attorney, to whom they had been delivered by the Marshal, to return them to the petitioner. The United States Attorney refused to obey this order and, being adjudged in contempt of court, sued out a direct writ of error from this Court. In the course of an opinion dismissing the writ for want of jurisdiction the Court said (p. 554):

> The only ground stated in the assignments of error which in the remotest degree refers to a matter which would come within our right to review is the third assignment, which asserts: "The court erred in adjudging that the taking into custody of said books and

> papers at the time of the lawful arrest of said Lawrence H. Mills, Charles G. Mourraille and Emil S. Duflot was in violation of the provisions of the Constitution of the United States." • • • But it is obvious on the face of the record that the error thus assigned and the discussion at bar in regard to it concern themselves, not with the order which it is sought to review, that is, the commitment for contempt, *but to another and different order not final in its character, that is, the order of the court directing the return of the books and papers. Alexander v. United States*, 201 U. S. 117. (Italic ours.)

And on page 555 the Court points out the misconception of the plaintiff in error in assuming "that the right to have a direct review of the final contempt order carries with it the right to have at the same time a review of *the interlocutory order returning the books.*" (Italics ours.)

The Dowling Case

So far as diligent search has revealed, the only dissent from the otherwise unbroken line of Federal decision upon the question of appeal involved in this case is to be found in the decision of the Circuit Court of Appeals for the Sixth Circuit in *Dowling* v. *Collins*, 10 F. (2d) 62. That was an original suit brought to quash search warrants, to secure a return of the property seized thereunder, and to suppress the use of such property as evidence. As appears from the record in that case,

the petitioner had previously moved for a return of the same property and for a suppression of evidence relating thereto prior to her trial in a criminal case. The motion was overruled and the evidence admitted at the trial over her objection. The jury failed to agree, however, and the case was set for retrial. Prior to the retrial the petitioner moved to quash the search warrants and to order the seized property returned. That motion was denied, but no trial was had as the jury was discharged because of the petitioner's illness, which would prevent her being present. In this situation the original suit was brought. After a trial at which all the evidence in the previous criminal case was introduced, the District Court dismissed the petition on the grounds, among others, (1) That petitioner having elected to test the validity of the seizure by motion in the criminal case, instead of by an independent proceeding, was estopped to bring the original suit, and (2) that the questions presented by the original petition were *res judicata* because of the orders on the motions in the criminal case. Upon writ of error the Circuit Court of Appeals sustained the rulings of the District Court both as to the estoppel and *res judicata* and affirmed the judgment. Regarding the question of *res judicata*, following its previous opinion in *MacDaniel* v. *United States*, 294 Fed. 769, 774, it said (p. 64):

> The reasoning of the opinion in *Perlman* v. *U. S.*, 247 U. S. 7, as well as in *Burdeau*

> v. *McDowell*, 256 U. S. 465, fully supports the conclusion that the orders on the preliminary motions and petitions in the criminal case were final and as such reviewable in this court; though entitled in that criminal case, they were no essential part of the trial therein; as preliminary matters they were as independent therefrom as were the petitions in the *Perlman* and *Burdeau cases*.

It is submitted that the decisions of this Court in the *Perlman* and *Burdeau cases* will not bear the construction there placed upon them. As hereinafter shown, the petitions in those cases were filed at a time when there were no other court proceedings, civil or criminal, pending to which the petitioners were parties. The orders denying the petitions were, therefore, necessarily final decisions for the purpose of review in this Court, and there is nothing in either opinion upon which to base the assumption that the Court would have exercised jurisdiction to review the orders appealed from had they been rendered in pending cases and that fact had been called to its attention.

(c) *The decisions of this Court upon which petitioner relies are distinguishable from the case at bar.*

Petitioner places strong reliance upon the decisions of this Court in *Perlman* v. *United States*, 247 U. S. 7; *Burdeau* v. *McDowell*, 256 U. S. 465; *Essgee Co.* v. *United States*, 262 U. S. 151, and *Steele*

v. *United States* No. 1, 267 U. S. 498, as establishing his right to appeal from the order rendered by the District Court in this case. A brief survey of the cases cited will show, however, that they lend no support to petitioner's contention. In the *Perlman case* a prior patent suit in which Perlman had appeared as a witness and in which articles belonging to him had been received as exhibits, was dismissed without prejudice, but the exhibits were impounded by order of the court. The United States Attorney thereafter instituted proceedings before a grand jury for an indictment of Perlman for perjury committed while testifying in the patent case, and applied to the court for an order directing the clerk to produce the aforesaid exhibits before the grand jury. A countervailing petition by Perlman, that the use of said exhibits as evidence by the United States Attorney be enjoined, was denied; the application of the United States Attorney was granted, and Perlman appealed directly to this Court. The Government moved to dismiss the appeal on the ground, among others, that "The order of the District Court if considered as a part of the criminal proceeding is not final, but merely interlocutory, and therefore not reviewable by this court." In denying the motion this Court said (p. 12):

> The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a pro-

> ceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

In referring to the criminal action as not yet brought notwithstanding the proceedings before the grand jury, the Court undoubtedly had in mind the rule announced in *Post* v. *United States*, 161 U. S. 583, 587, as follows:

> Criminal proceedings can not be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. *Virginia* v. *Paul*, 148 U. S. 107, 119, 121; *Rex.* v. *Phillips, Russ. & Ry.* 369; *Regina* v. *Parker, Leigh & Cave*, 459; S. C. 9 Cox Crim. Cas. 475. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced; the grand jury may ignore the bill, and decline to find any indictment; and it can not be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court.

As, therefore, when the order reviewed in the *Perlman case* was made the proposed criminal action had not been brought and the civil action had been dismissed, the only proceedings pending were those involving the use of the exhibits as evidence before the grand jury, and as those proceedings were fully terminated by the order it was necessarily a final order subject to review.

In the *McDowell case* the petition prayed the return to McDowell of papers which had been stolen from him and turned over to Burdeau, a Special Assistant to the Attorney General, who proposed to use them as evidence before a grand jury to secure an indictment of McDowell for fraudulent use of the mails. The District Court granted the petition and Burdeau sought review of that order upon a direct appeal to this Court. As no criminal case against McDowell was pending and the order appealed from completely disposed of the proceedings in which it was rendered, it was obviously a final order for appellate purposes.

In *Essgee Co.* v. *United States* the petitions for the return of books and papers were filed after indictments had been returned against the petitioners. The petitions were not entitled as in the criminal cases, however, but were plainly intended by the petitioners and treated by the District Court as the beginning of new and independent proceedings. Review of the orders denying the petitions was sought in this Court both on writ of error and

appeal. In the Government's brief filed in this Court (October Term, 1922, Nos. 706, 707) the first point argued was that the Court was without jurisdiction because the orders appealed from were interlocutory. It was urged that *Burdeau* v. *McDowell* and *Perlman* v. *United States, supra*, were distinguishable in that in those cases there were no criminal actions pending, and that the proceedings were, therefore, entirely independent and the orders rendered therein essentially final. In its decision subsequently handed down this Court, while pointing out that appeal, rather than writ of error, was the proper mode of review, said nothing regarding the finality for appellate purposes of the orders under review, but proceeded to a determination of their correctness on the merits. It would appear to be plain, therefore, that this Court regarded the proceedings in which the orders reviewed by it were rendered as being fully as independent of any pending case as were the proceedings reviewed in the *Burdeau* and *Perlman cases*.

In the *Steele case* prohibition agents executing a warrant to search Steele's premises found and seized intoxicating liquor. Steele thereupon appeared in the commissioner's court and moved that the warrant be quashed and the liquor returned on the ground that "the search was clearly in violation of the Fourth Amendment to the Constitution of the United States" (Transcript in No. 235, October Term, 1924, page 10). The commissioner overruled the motion on August 29, 1923. (*Id.* p.

46.) The information against Steele was filed thereafter. Steele then filed an application in the District Court for a review of the proceedings before the commissioner and for an order quashing the warrant and directing a return of the seized property. The District Court denied the application and its order was affirmed by this Court upon a direct appeal. No reference to any pending criminal case was made in the title of the petition, in the petition itself, or anywhere else in the record of the proceedings in the District Court. The proceedings, begun before the Commissioner, were plainly independent of the criminal case which arose later and came to this Court upon a separate record and was disposed of as a separate case. *Steele* v. *United States*, No. 1 (267 U. S. 498) came up on appeal, and *Steele* v. *United States* No. 2 (267 U. S. 505), came up on writ of error.

It is apparent, therefore, that none of the foregoing decisions of this Court cited by petitioner is authority for his contention that an order denying a motion in a criminal case for the return of seized property and for the suppression of its use as evidence is a final decision subject to review.

If petitioner were correct in his assertion that the order of the District Court in the instant case finally disposed of special proceedings which were separate and distinct from the criminal case in which the motion overruled by said order was made, it would follow that all questions involving the

validity of the seizure would be *res judicata* and could not again be passed upon by the court in considering objections to evidence at the trial.

In *Steele* v. *United States No. 2, supra,* it was held that the questions presented by assignments of error to the overruling of objections to evidence, whether the prohibition agent who executed the search warrant was authorized to do so, and whether there was probable cause for the issuance of such warrant, were *res judicata* because those questions had either been determined, or could have been raised and determined, in the separate proceedings begun by Steele's petition for the return of property and suppression of evidence. On the other hand, in *Gouled* v. *United States,* 255 U. S. 298, where the petition for the return of property was filed in the criminal case, the question certified to this Court, whether the District Court was required after having denied such petition to rule upon the same points again when raised in the form of objections to evidence, was answered in the affirmative, the Court saying (p. 313):

> In the case we are considering the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become

> apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant.

So, also, in *Byars* v. *United States*, 273 U. S. 28, 29, and *Marron* v. *United States*, 275 U. S. 192, 194, in each of which a petition for return of seized property, etc., was filed in the criminal case, this Court specifically referred to the fact that such prior petitions had been made and denied before objections upon the same grounds to evidence at the trial were overruled by the District Court.

These references to decisions of this Court show clearly the Court's view that where independent proceedings are brought to obtain the return of seized property and the suppression of evidence concerning it, the order of the court granting or denying the relief prayed is a final decision; but that where, as in the present instance, such relief is sought by a motion in a pending criminal case the order upon the motion is but interlocutory.

The language quoted by petitioner from *Segurola* v. *United States*, 275 U. S. 106, 111, comprises an excerpt from a restatement by this Court of the principle laid down in *Adams* v. *New York*, 192 U. S. 585, and recognized in *Weeks* v. *United States*, 232 U. S. 383, 395, and in *Marron* v. *United States*, 275 U. S. 192, 194, that, except where there

has been no opportunity to present the question in advance of the trial, "a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence."

This is construed by petitioner as holding that where such an objection to a seizure has been made before trial the defendant can not object to the introduction of the seized property in evidence at the trial, and upon this construction he bases the argument that unless an appeal will lie to the overruling of his motion made before trial in the instant case, he will have no right of appeal therefrom at all because he can not raise the question at the trial and his bill of exceptions will accordingly fail to show his grievance. But this Court neither said, nor, it is submitted, did it intend to hold, in the *Segurola case*, that such an objection made and denied before trial precludes the defendant from objecting upon the same grounds to the introduction of the seized property in evidence at the trial or from obtaining a review of the order on the application or motion on the record of the whole case on appeal. The contrary was specifically held in *Gouled* v. *United States, supra*, and the procedure was followed, with the sanction of this Court, in the late cases of *Byars* v. *United States, supra*, and *Marron* v. *United States, supra*.

CONCLUSION

The Government does not oppose a review of this case on its merits. But having regard to the policy of the law of avoiding piecemeal appeals and of securing the orderly progress of a cause, it believes that such review should be had on appeal from the conviction, if any there be. There are several contingencies which may render appeals from such interlocutory orders wholly superfluous, the only net result being delays in the administration of justice.

It is submitted, therefore, that the Circuit Court of Appeals correctly dismissed the writ of error in this case and that its judgment should be affirmed.

Respectfully,

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